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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

v.

CALIFORNIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321

IOWA UTILITIES BOARD,
Petitioner,

BELL ATLANTIC CORPORATION; BELLSOUTH CORPORATION; PACIFIC TELESIS GROUP; SBC COMMUNICATIONS, INC.; MARYLAND PUBLIC SERVICE COMMISSION; US WEST, INC.; US TELEPHONE ASSOCIATION; ARKANSAS PUBLIC SERVICE COMMISSION; ALLTEL TELEPHONE SERVICES CORPORATION; AMERITECH CORPORATION; OREGON PUBLIC UTILITY COMMISSION; NORTH STATE TELEPHONE COMPANY; WESTERN ALLIANCE; INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE; ROSEVILLE TELEPHONE COMPANY; CONCORD TELEPHONE COMPANY; ROCK HILL TELEPHONE COMPANY; PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; AMERICAN PUBLIC COMMUNICATIONS COUNCIL, INC.; ICG TELECOM GROUP, INC.; MINNESOTA PUBLIC UTILITIES COMMISSION; SOUTHERN NEW ENGLAND TELEPHONE COMPANY; THE AD HOC COALITION OF TELECOMMUNICATIONS MANUFACTURING COMPANIES; PACIFIC TELECOM, INC.; MINNESOTA INDEPENDENT COALITION; KENTUCKY PUBLIC SERVICE COMMISSION; KANSAS CORPORATION COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF WYOMING; RHODE ISLAND PUBLIC UTILITIES COMMISSION; PUBLIC SERVICE COMMISSION OF WISCONSIN; STATE OF TEXAS; ALABAMA PUBLIC SERVICE COMMISSION; CITIZENS TELEPHONE COMPANY OF KECKSBURG; NEW MEXICO

STATE CORPORATION COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA; GTE SERVICE CORPORATION; UTAH DEPARTMENT OF COMMERCE, DIVISION OF PUBLIC UTILITIES; PUBLIC SERVICE COMMISSION OF UTAH; PUBLIC SERVICE COMMISSION OF THE STATE OF SOUTH CAROLINA; TENNESSEE REGULATORY AUTHORITY; AGING FORUM, INC., DOING BUSINESS AS NATIONAL SILVER HAIRED CONGRESS; U.S. COALITION ON AGING; COLLEGE FOR LIVING; COUNCIL OF SILVER HAIRED LEGISLATURES; MISSOURI ALLIANCE OF AREA AGENCIES ON AGING; MISSOURI ASSOCIATION FOR THE DEAF; MISSOURI COUNCIL OF THE BLIND; PRESIDENTS' CLUB FOR TELECOMMUNICATIONS JUSTICE; PARAQUAD, RURAL ADVOCATES FOR INDEPENDENT LIVING; SERVICES FOR INDEPENDENT LIVING; PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS; OKLAHOMA CORPORATION COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC UTILITY CONTROL; NEW YORK TELEPHONE COMPANY; NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Intervenors on Appeal,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents,

AT&T CORP.; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION; MFS COMMUNICATIONS COMPANY, INC.; AIRTOUCH COMMUNICATIONS, INC.; NEXTLINK COMMUNICATIONS, L.L.C.; SPRINT SPECTRUM, L.P.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; MCI TELECOMMUNICATIONS CORPORATION; SPRINT CORP.; COX COMMUNICATIONS, INC.; VANGUARD CELLULAR

SYSTEMS, INC.; WESTERN WIRELESS CORPORATION; AMERICAN COMMUNICATIONS SERVICES, INC.; KMC TELECOM, INC.; THE COMPETITION POLICY INSTITUTE; ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES; CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION; GST TELECOM, INC.; ACC CORP.; GENERAL COMMUNICATION, INC.; TELECOMMUNICATIONS RESELLERS ASSOCIATION; CONSUMER FEDERATION OF AMERICA; AD HOC TELECOMMUNICATIONS USERS COMMITTEE; INFORMATION TECHNOLOGY INDUSTRY COUNCIL; AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION; JONES INTERCABLE, INC.; TELECOMMUNICATIONS, INC.; TELEPORT COMMUNICATIONS GROUP, INC.; RURAL TELECOMMUNICATIONS GROUP; ALLIED ASSOCIATED PARTNERS; GELD INFORMATION SYSTEMS; PRONET, INC.; WINSTAR COMMUNICATIONS, INC.; U.S. ONE COMMUNICATIONS SERVICES; COMCAST CORPORATION; FRONTIER CORPORATION; ANAHEIM, CALIFORNIA PUBLIC UTILITIES DEPARTMENT; CITY OF LONG BEACH, CALIFORNIA; CITY OF MANASSAS, VIRGINIA; CABLE & WIRELESS, INC.; NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES; TIME WARNER COMMUNICATIONS HOLDINGS, INC.; PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION; EXCEL TELECOMMUNICATIONS, INC.; PAGING NETWORK, INC.; NEXTWAVE TELECOM, INC.; SMALL CABLE BUSINESS ASSOCIATION; WORLDCOM, INC.; METROCALL, INC.; TEXAS OFFICE OF PUBLIC UTILITY COUNSEL,

Intervenors on Appeal,

CONSUMERS' UTILITY COUNSEL DIVISION, GEORGIA GOVERNOR'S OFFICE OF CONSUMER AFFAIRS; HONORABLE JOHN D. DINGELL; HONORABLE W.J. (BILLY) TAUZIN; HONORABLE RICK BOUCHER; HONORABLE DENNIS HASTERT,

Amici on Behalf of Petitioner,

HONORABLE THOMAS J. BLILEY, JR.; HONORABLE ERNEST F. HOLLINGS; HONORABLE TED STEVENS; HONORABLE DANIEL K. INOUYE; HONORABLE TRENT LOTT; HONORABLE EDWARD J. MARKEY,
Amici on Behalf of Respondent.

In addition to the above caption, the Parties for Docket Numbers: 96-3406, 96-3410, 96-3414, 96-3416, 96-3418, 96-3424, 96-3430, 96-3436, 96-3444, 96-3450, 96-3453, 96-3460, 96-3507, 96-3519, 96-3520, 96-3603, 96-3608, 96-3696, 96-3708, 96-3709, 96-3756, 96-3901, 96-3906, 96-3982, are listed in Appendix E

On Petition for Review of an Order of the
Federal Communications Commission

Submitted: January 17, 1997
Filed: July 18, 1997

Before BOWMAN, WOLLMAN and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

When Alexander Graham Bell, after spilling sulfuric acid on himself, first transmitted the words, "Mr. Watson, come here; I want you," across a rudimentary phone line in 1876,[1] he could not have possibly imagined that his invention would explode into the current technologically-advanced, multi-billion dollar telecommunications industry.

[1] George P. Oslin, *The Story of Telecommunications*, 219 (Mercer University Press 1992).

Nor could he have foreseen the amount of legislation, regulation, and litigation that his invention would generate.

I. Background

One hundred twenty years after Bell's discovery, Congress passed the Telecommunications Act of 1996[2] (the Act), which was designed, in part, to erode the monopolistic nature of the local telephone service industry by obligating the current providers of local phone service (known as "incumbent local exchange carriers" or "incumbent LECs") to facilitate the entry of competing companies into local telephone service markets across the country. Specifically, the Act forces an incumbent LEC (1) to permit a requesting new entrant in the incumbent LEC's local market to interconnect with the incumbent LEC's existing local network and thereby use the incumbent LEC's network to compete with the incumbent LEC in providing telephone services (interconnection); (2) to provide its competing telecommunications carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell to its competing telecommunications carriers, at wholesale rates, any telecommunications service that the incumbent LEC provides to its customers at retail rates, in order to allow the competing carriers to resell the services (resale).[3] 47 U.S.C.A. § 251(c)(2)-(4) (West Supp. 1997).[4] A company seeking to enter the local telephone service market may request an incumbent LEC to provide it with any one or any combination of these three

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of Title 47, United States Code).

[3] We refer to these duties as "the local competition provisions."

[4] All references in this opinion to sections and subsections of the Telecommunications Act of 1996 in West's United States Code Annotated (U.S.C.A.) are to the 1997 supplement.

services. Through these three duties, and the Act in general, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996).

The Act also establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between incumbent LECs and competing carriers to implement the Act's substantive requirements. When a competing carrier asks an incumbent LEC to provide interconnection, unbundled access, or resale, both the incumbent LEC and the competing carrier have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the Act's goals. 47 U.S.C.A. §§ 251(c)(1), 252(a)(1). If the parties fail to reach an agreement through voluntary negotiation, either party may petition the respective state utility commission to arbitrate and resolve any open issues. *Id.* § 252(b). The final agreement, whether accomplished through negotiation or arbitration, must be approved by the state commission. *Id.* § 252(e)(1).

Several sections of the Act also direct the FCC to participate in the Act's implementation. *See, e.g., id.* §§ 251(b)(2), (d)(1), (e), 252(e)(5). On August 8, 1996, the FCC issued its First Report and Order.[5] This document contains the Agency's findings and rules[6] pertaining to the local competition provisions of the Act.

[5] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996) [hereinafter First Report and Order].

[6] The FCC's rules are contained in Appendix B of the First Report and Order and now are codified in scattered sections of Title 47, Code of Federal Regulations.

Soon after the FCC released its First Report and Order, many petitioners, consisting largely of incumbent LECs and state utility commissions from across the country, filed motions to stay the First Report and Order in whole or in part. Although most of the petitioners requested the court to stay the entire First Report and Order, their specific attacks focused primarily on the FCC's rules regarding the prices that the incumbent LECs could charge their new competitors for interconnection, unbundled access, and resale, as well as on the rules regarding the prices for the transport and termination of local telecommunications traffic.[7] The petitioners argued that the FCC exceeded its jurisdiction in establishing prices for what is essentially local intrastate telecommunications service and that the pricing rules violate the terms of the Act. After the cases were consolidated in this circuit, we decided to stay temporarily, pending our final review, the operation and effect of the pricing provisions and the "pick and choose" rule found in the First Report and Order. *Iowa Utilities Bd. v. FCC*, 109 F.3d 418 (8th Cir.), *motion to vacate stay denied*, 117 S. Ct. 429 (1996); *see id.* at 423 (explaining "pick and choose" rule in greater detail).

In their main briefs and oral arguments, the petitioners now renew and refine their attacks against the Agency's pricing rules, and they also widen the scope of their challenge to the First Report and Order and assail additional FCC rules, particularly the agency's non-price regulations pertaining to the incumbent LEC's unbundling obligations.

[7] Transport and termination of telecommunications is the process whereby a call that is initiated by a customer of one telecommunications carrier is routed to a customer of a different telecommunications carrier and completed by that carrier. The telecommunications carrier that "terminates" or completes the call to its customer typically charges the other telecommunications carrier for the cost of terminating the call. The Act imposes a duty on all local exchange carriers (incumbents and new entrants) to establish reciprocal compensation arrangements for such transport and termination of phone calls. *See id.* § 251(b)(5).

Our review of the extensive arguments in this case has confirmed our initial belief that the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service. We also remain convinced that FCC's "pick and choose" rule would frustrate the Act's design to make privately negotiated agreements the preferred route to local telephone competition. Our conclusions regarding the additional challenged policies and rules in the FCC's First Report and Order are contained throughout the remainder of this opinion.

II. Analysis

United States Court of Appeals have been granted exclusive statutory jurisdiction to review the FCC's final orders pursuant to 28 U.S.C. § 2342(1) (1994) and 47 U.S.C. § 402(a) (1994). We must defer to administrative agency interpretations only if they are consistent with the plain meaning of a statute or are reasonable constructions of ambiguous statutes. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Thus, we are empowered to overturn an agency interpretation when the interpretation conflicts with the plain meaning of a statute, *see id.* at 842-43, when the interpretation is an unreasonable construction of an ambiguous statute, *see id.* at 844-45, or when an agency acted arbitrarily or capriciously in adopting its interpretation. *See* 5 U.S.C. § 706 (1994); *Chevron*, 467 U.S. at 844. In this case, we emphasize at the beginning that our review does not encompass any determination regarding the wisdom or prudence of the policies Congress set forth in the Act, those considerations being the Constitutionally-assigned prerogatives of the Legisaltive Branch of our national government.

A. The FCC's Pricing Rules

All of the petitioners vehemently challenge the FCC's pricing rules. Their primary target is the FCC's mandate

that state commissions employ the "total element long-run incremental cost" (TELRIC) method to calculate the costs that an incumbent LEC incurs in making its facilities available to competitors. *See* 47 C.F.R. §§ 51.503, 51.505 (1996). After applying the TELRIC method and arriving at a cost figure, the state commissions, according to the FCC's rules, must then determine the price that an incumbent LEC may charge its competitors, based on the TELRIC-driven cost figure.[8] The petitioners also challenge the FCC's proxy rates, which, under the provisions of the First Report and Order, are to be used by the state commissions if they do not use the TELRIC method to calculate costs. *See id.* §§ 51.503(b)(2), 51.513, 51.705(a)(2), 51.707. The incumbent LECs assert that these proxy rates also do not accurately reflect their costs and are artificially low. The petitioners also challenge several other FCC regulations pertaining to the prices that the incumbent LECs are permitted to charge for fulfilling their new duties under the Act. *See id.* §§ 51.601-51.611, 51.701-51.717.

The petitioners' first line of attack against the FCC's pricing rules is their claim that the FCC has no jurisdiction to promulgate these rules. They argue that the Act plainly directs state commissions, not the FCC, to set the prices that an incumbent LEC may charge an incoming competitor for interconnection, unbundled access, and resale, and also to determine the prices for the transport and termination of calls, when the state commissions conduct arbitra-

[8] Many of the incumbent LECs complain that the TELRIC method does not incorporate their "historical" or "embedded" costs (costs that an incumbent LEC incurred in the past to build its local network and has not yet fully recovered under state regulations) into the cost figure that forms the basis for determining the rates that the incumbent LECs may charge. *See id.* § 51.505(d)(1). The incumbent LECs argue that the TELRIC method underestimates their costs to provide interconnection and unbundled access and results in prices that are too low, effectively requiring them to subsidize their new local service competitors.

tions under the Act.[9] The petitioners also assert that section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b) (1994), denies the FCC jurisdiction to determine these rates because the rates involve local intrastate communications service. The FCC and its supporting intervenors, however, contend that the Act clearly grants the FCC the power to issue pricing rules regarding local telephone service and that section 2(b) does not prevent the Commission from having jurisdiction to issue the pricing rules at issue here. They do not claim that the FCC's pricing authority is exclusive; instead, they argue that the Act establishes shared or parallel jurisdiction between the states and the FCC under which the FCC is to issue general rules governing the ratemaking procedures, while the state commissions are left to establish the actual prices by applying the FCC's mandates. After carefully reading the language of the Act and fully considering and reviewing all of the arguments, we conclude that the FCC exceeded its jurisdiction in promulgating the pricing rules.

1. The Plain Language of Sections 251 and 252

The petitioners point to the language contained in subsections 252(c)(2) and 252(d) to support their claim that the Act directly grants the state commissions the authority to determine the rates involved in implementing the local competition provisions of the Act. Indeed, subsection 252(c)(2) requires a *state commission* to "establish any rates for interconnection, services, or network elements according to subsection (d) of this section." Meanwhile, subsection 252(d), entitled "Pricing standards," lists the requirements that the *state commissions* must meet in making their determinations of the appropriate rates for interconnection, unbundled access, resale, and transport and termination of traffic. 47 U.S.C.A. § 252(d)(1)-(3). These statutory provisions undeniably authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act.

[9] The FCC's rules and regulations have direct effect only in the context of the state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations. *See* 47 U.S.C.A. § 252(a)(1), (e)(2). While we have no way of quantifying the indirect effect the existence of these new rules had or may have on the positions taken by the incumbent LECs and their new competitors during the negotiation phase, we believe the mutual knowledge that a state commission would be required to abide by these rules during the arbitration phase (absent our stay) had or would have some impact on the negotiations.

The FCC and its supporters do not contest the fact that state commissions have the responsibility to set prices under the Act. Instead, they claim that subsection 251(d)(1) gives the FCC parallel authority to issue regulations governing the rate-making methods by which state commissions establish the prices that incumbent LECs may charge their new competitors for connecting with and piggy-backing on the LECs' networks. They claim that subsection 252(c)(1) requires the state commissions to follow these FCC mandates when they determine the actual prices. The FCC also believes that several general rulemaking provisions of the Communications Act of 1934, namely subsections 154(i), 201(b), and 303(r), provide it with additional authority to promulgate its pricing rules. *See* 47 U.S.C. §§ 154(i), 201(b), 303(r) (1994).

Despite the FCC's contentions, we are not convinced that these provisions supply the FCC with the authority to issue regulations governing the pricing of the local intrastate telecommunication services that the incumbent LECs are now legally obligated to provide to their new competitors. Subsection 251(d)(1) provides that "[w]ithin 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C.A. § 251(d)(1). The FCC believes this provision supplies

the Agency with overarching plenary authority to regulate all aspects of section 251 and reasons that because subsection 251(c) requires rates for interconnection, unbundled access, and collocation to be "just, reasonable, and nondiscriminatory," *id.* § 251(c)(2)(d), (c)(3), (c)(6), the FCC has the power to regulate these rates and any other rates mentioned in section 251. We are not persuaded by the FCC's interpretation. We believe that subsection 251(d)(1) operates primarily as a time constraint, directing the Commission to complete expeditiously its rulemaking regarding only the areas in section 251 where Congress expressly called for the FCC's involvement.[10] Nowhere in section 251 is the FCC authorized specifically to issue rules governing the rates for interconnection, unbundled access, and resale, and the transport and termination of telecommunications traffic.

The Commission's reliance on general rulemaking provisions that predate the Telecommunications Act of 1996 also fares no better. While subsection 201(b) does grant the FCC jurisdiction over charges regarding communications services, those services are expressly limited to interstate or foreign communications services by subsection 201(a). *See* 47 U.S.C. § 201. Consequently, subsection 201(b) does not provide the Commission with the authority to regulate the rates of local intrastate phone service and neither do subsections 154(i) or 303(r). Both of these subsections merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. Neither subsection confers additional substantive authority on the FCC. *See id.* §§ 154(i), 303(r); *see*

[10] Such areas are limited to subsections 251(b)(2) (number portability), 251(c)(4)(B) (prevention of discriminatory conditions on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (continued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents).

also California v. FCC, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990) (explaining that Title I of the Communications Act of 1934, in which section 154(i) is contained, confers only ancillary authority to the FCC). Thus, we conclude that none of the statutory provisions relied on by the FCC supply it with jurisdiction over the pricing of local telephone service.[11]

The absence of any direct FCC pricing authority over local telephone service is fatal to the Agency's theory that the Act requires the state commissions to share such local pricing authority with the FCC. While subsection 252(c)(1) does require the state commissions to ensure that their resolutions of arbitrated disputes comply with both section 251 and with the FCC's regulations made pursuant to section 251, as explained above, no provision in section 251 authorizes the FCC to regulate the rates of local phone service.[12] Moreover, the absence of any reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices confirms to us that Congress did not envision the FCC's participation in determining the prices that the incumbent LECs will be able to charge for opening their networks to new entrants. Subsection 252(c)(2) commands state commissions to "establish any rates for interconnection, services, or network elements" and it requires them to follow only the standards in subsec-

[11] At oral argument, counsel for one of the intervenors in support of the FCC for the first time argued that section 401 of the Act, 47 U.S.C.A. § 160 (West Supp. 1997), implies that the Commission has jurisdiction to issue its pricing rules. We decline to address this argument since it was not raised in the parties' opening briefs. *See Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303, 1306-07 n.3 (8th Cir. 1997).

[12] We recognize that the Act does create such a division of labor between the state commissions and the FCC with respect to those areas where section 251 specifically calls for the Commission's participation. *See supra* note 10 and accompanying text.

tion (d). 47 U.S.C.A. § 252(c)(2). In turn, subsection 252(d) refers exclusively to the determinations by state commissions of the just and reasonable rates, and it provides statutory standards for the state commissions to follow when setting the rates, thus negating any need for additional FCC-mandated ratemaking standards or guidelines.[13] *See id.* § 252(d).

Additionally, the FCC's reference to the Cable Act[14] as an example of a system of parallel federal and state jurisdiction over an industry's rates only bolsters our view that no such shared scheme regarding the power to set prices was intended by the Congress in the Telecommunications Act of 1996. In sharp contrast to the Telecommunications Act, several provisions of the Cable Act explicitly grant the Commission the authority to regulate the rates of cable companies and explicitly require state authorities to follow the Commission's ratemaking rules. *See* 47 U.S.C. § 543(a)(2)-(3), (b) (1994). The Cable Act simply and forcefully demonstrates that the Congress is capable of clearly expressing its desire to grant the FCC authority over local rates when it wishes to do so. The Telecommunications Act contains no such articulation with respect to the local competition provisions. Consequently, we conclude that the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act.[15]

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[13] Moreover, the provisions of subsection 252(d) expressly state that the states are setting the rates "for the purposes of" subsections 251(c)(2) (interconnection duty), 251(c)(3) (unbundling duty), 251(c)(4) (resale duty), and 251(b)(5) (reciprocal compensation duty).

[14] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

[15] Our determination that the FCC's belief that it has jurisdiction to issue local pricing rules conflicts with the plain meaning of the Act negates any deference owed to the Commission's interpretation

2. Section 2(b) and the Impossibility Exception

Any ambiguity regarding the FCC's vacuum of authority over local telecommunications pricing under the Act is resolved by the operation of section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b). Section 2(b) provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." *Id.* We believe that the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale—the services and facilities that will enable the competitors to provide competing *local* telecommunications service—as well as the rates for the transport and termination of telecommunication traffic qualify as "charges . . . for or in connection with intrastate communications service."[16] *Id.* In *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986), the Supreme Court explained that section 2(b) "fences off" intrastate matters from FCC regulation. The FCC and its supporting intervenors attempt to slip through the fence by argu-

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and obligates us to vacate the FCC's pricing ruels. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 382 (1988) (Scalia, J., concurring) ("[I]n defining agency jurisdiction Congress sometimes speaks in plain terms, in which case the agency has no discretion.")

[16] The FCC itself both acknowledges that the Telecommunications Act of 1996 deals predominantly with local intrastate markets and recognizes that the obligations of incumbent LECs to provide interconnection, unbundled access, and resale are deisgned to increase competition in *local* telecommunications markets. (FCC Br. at 1-3, 5.) The intrastate character of the requirements contained in sections 251 and 252 is discussed further infra.

ing that this case qualifies as an exception to the operation of section 2(b).

The Supreme Court emphasized that section 2(b) constitutes an explicit congressional denial of power to the FCC and suggested that Congress could override section 2(b)'s command only by unambiguously granting the FCC authority over intrastate telecommunications matters or by directly modifying section 2(b). *Louisiana*, 476 U.S. at 377. The only other gate through the 2(b) fence is the "impossibility" exception, which has evolved out of the Court's opinion in *Louisiana*. This quite narrow exception provides that the FCC may preempt state regulation of intrastate telecommunications matters only when (1) it is impossible to separate the interstate and intrastate components of the FCC regulation and (2) the state regulation would negate the FCC's lawful authority over interstate communication. *See, e.g., id.* at 375-76 n.4; *California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995); *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989). The FCC and its supporting intervenors assert that the terms of the Act supply the Commission with a direct grant of intrastate pricing authority sufficient to overcome the operation of section 2(b). Alternatively, they argue that the impossibility exception removes section 2(b) as a barrier to the FCC's pricing rules. We are not convinced by the respondents' arguments here, and we believe that the 1996 Act, when coupled with section 2(b), mandates that the states have the exclusive authority to establish the prices regarding the local competition provisions of the Act.

As explained earlier, the FCC argues that Congress unambiguously granted it intrastate pricing authority through the relationship between subsections 251(d)(1) (directing the Commission to establish regulations to implement the requirements of section 251 by August 8,

1996) and 251(c) (periodically mentioning that the incumbent LECs' rates must be just and reasonable). We have now rejected this interpretation as being inconsistent with the plain meaning of the Act, and we have concluded exactly the opposite—that the Act directly and straightforwardly assigns to the states the authority to set the prices regarding the local competition provisions of the Act in subsections 252(c)(2) and 252(d). Consequently, the FCC's interpretation of the Act does not demonstrate an unambiguous grant of intrastate authority to the FCC required either to jump over or pass through section 2(b)'s fence. *See Louisiana*, 476 U.S. at 376-77 n.5 (explaining that section 2(b) also operates as a rule of statutory construction, commanding that nothing in the Act be construed to extend FCC jurisdiction to intrastate telecommunications).

Congress is fully capable of opening the gate in the 2(b) fence in order to grant the FCC intrastate ratemaking authority when it wishes to do so. Once again, provisions of the Cable Act illustrate this point. One such provision reads, "The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable." 47 U.S.C. § 543(b)(1). Moreover, section 276 of the Telecommunications Act itself directly requires the FCC to establish a compensation plan regarding both intrastate and interstate pay phone calls. 47 U.S.C.A. § 276(b); *Illinois Pub. Telecomm. Ass'n v. FCC*, No. 96-1394, 1997 WL 358160, at *5 (D.C. Cir. July 1, 1997). The FCC's roundabout construction in its effort to claim intrastate pricing authority under section 251 of the Telecommunications Act is notably strained in stark comparison to the direct grant of such authority contained in both the Cable Act and in section 276 of the Telecommunications Act, thus providing more indications that Congress intended to reserve for the states the retained authority to set the prices regarding the local competition provisions contained in section 251 of the Telecommuni-

cations Act of 1996. Additionally, certain nonpricing provisions of the Telecommunications Act provide the FCC with much more direct and unambiguous grants of intrastate authority than the FCC's strained reading of subsections 251(d) and 251(c). For instance, subsection 251(b)(2) burdens LECs with "[t]he duty to provide . . . number portability in accordance with requirements prescribed by the Commission." 47 U.S.C.A. § 251(b)(2) (West Supp. 1997). In contrast, no provision of the Act unambiguously requires *rates* for the local competition provisions to comply with FCC-prescribed requirements, no provision unambiguously directs the FCC to issue such *pricing* regulations, and there is no straightforward and unambiguous modification of section 2(b) in the Act.[17] Consequently, section 2(b) remains a barrier to the validity of these FCC pricing rules.

Faced with the absence of such an unambiguous grant of intrastate pricing authority to the FCC, the Commission and its supporting intervenors resort to arguing that section 2(b) is easily overcome whenever a federal statute's *terms* unambiguously apply to intrastate telecommunication matters, because they believe the FCC has plenary authority to implement all such *federal* statutory requirements. They believe that the *Louisiana* decision supports their proposition that section 2(b) prevents only the FCC's ancillary jurisdiction from extending into intrastate areas, but that it does not limit the *federal* Commission's primary jurisdiction, which, they argue, presumably extends as far as the reach of a federal communications statute. We do not believe that section 2(b) is limited in this manner, nor do we think the Supreme Court's decision in *Louisiana* stands for such a far-reaching proposition.

[17] In fact, provisions that expressly exempted the local competition provisions of the Act from the operation of section 2(b) were included in the earlier versions of both the House and Senate bills, but the Conference Committee deleted them from the final version of the Act. *See* S. 652, 104th Cong. § 101(e)(2) (1995); H.R. 1555, 104th Cong. § 101(e)(1) (1995).

Although the Court's decision in *Louisiana* focused on whether section 220(b) of the Communications Act of 1934 itself applied to intrastate telecommunication matters, it did so only because section 220 undeniably directed the FCC to administer the depreciation calculations required by the statute. *See* 47 U.S.C. § 220(b) (1994) (repeatedly referring to "the Commission"); *see also Louisiana*, 476 U.S. at 366-68. In other words, we believe that the *Louisiana* decision indicates that in order to qualify for the "unambiguous" exception to section 2(b), a statute must *both* unambiguously apply to intrastate telecommunication matters *and* unambiguously direct the FCC to implement its provisions. In *Louisiana*, section 220(b) clearly passed the second prong but failed to meet the first prong. In the present case, we have the opposite situation: the pricing provisions of sections 251 and 252 clearly apply to intrastate telecommunication service, but they do not unambiguously call for the FCC's participation in setting the rates. To the contrary, the Act specifically calls for the state commissions, not the FCC, to determine the rates for interconnection, unbundled access, resale, and transport and termination of traffic. *See* 47 U.S.C.A. § 252(c)(2), (d). Consequently, we reject the FCC's contention that its rulemaking authority is coextensive with the reach of every provision of a federal statue involving telecommunications. Section 2(b) is not a limit on Congress's ability to legislate in the area of intrastate telecommunications; it is, however, a limit on the FCC's ability to regulate in the area of intrastate telecommunications. Thus, a federal statute's mere application to intrastate telecommunication matters is insufficient to confer intrastate jurisdiction upon the FCC; the statute must also directly grant the FCC such

intrastate authority in order to overcome the operation of section 2(b).[18]

The respondents' last chance to breach the section 2(b) fence lies with the "impossibility" exception to section 2(b). As mentioned above, the impossibility exception allows an FCC regulation to preempt a state regulation when it is impossible to separate the interstate and intrastate components of the asserted FCC regulation and the state regulation would negate the FCC's authority over interstate communication. *See, e.g., Louisiana,* 476 U.S. at 375-76 n.4; *California v. FCC,* 75 F.3d 1350, 1359 (9th Cir.), *cert. denied,* 116 S. Ct. 1841 (1996); *NARUC,* 880 F.2d at 429.

We believe that this exception does not apply to the circumstances of this case and thus does not give the FCC the authority to dictate pricing regulations governing the local competition provisions of the Act. First, telecommunication ratemaking traditionally has been capable of being separated into its interstate and intrastate components. In fact, other statutory provisions predating the 1996 Act require such separation to occur and command a joint board of federal and state regulators to execute the separations process. 47 U.S.C. §§ 221(c), 410(c) (1994); *see also NARUC,* 880 F.2d at 425.

Second, and more importantly, the FCC has not demonstrated that the states' authority to establish the rates in connection with the local competition provisions of the Act would negate any valid authority the Commission has over interstate communications or impede any of its

[18] The FCC and its supporting intervenors assert that the provisions granting the Commission general rulemaking authority (47 U.S.C. §§ 154(i), 201(b), 303(r)) provide the FCC with plenary authority that is coextensive with the reach of all federal telecommunications law. For the reasons we previously found these sections to be inadequate to supply the Commission with the direct authority to issue the local pricing rules, we find them inadequate to provide the FCC with such sweeping authority here.

interstate regulatory goals. *See California,* 75 F.3d at 1359 (burden on FCC to demonstrate negation). The impossibility exception is premised on a preemption analysis, and "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[19] *Louisiana,* 476 U.S. at 369, Consequently, our inquiry returns to the language of the Act. As illustrated above, the terms of the Act clearly indicate that Congress did not intend for the FCC to issue any pricing rules, let alone preempt state pricing rules regarding the local competition provisions of the Act. *See* 47 U.S.C.A. § 252(c)(2), (d). Because the Act clearly grants the states the authority to set the rates for interconnection, unbundled access, resale, and transport and termination of traffic, the FCC has no valid pricing authority over these areas of new localized competition for the states to negate. "An agency may not act at all, let alone preempt state authority, in an area where Congress has explicitly denied it jurisdiction." *NARUC,* 880 F.2d at 428. The fact that there are specific statutory provisions that expressly indicate that the states have the authority to determine the rates for these local telecommunications services distinguishes this case from all of the cases that invoke the impossibility exception to allow the FCC to preempt state regulations. *See, e.g., California v. FCC,* 39 F.3d 919 (9th Cir. 1994); *California v. FCC,* 4 F.3d 1505 (9th Cir. 1993); *Public Utility Comm'n of Texas v. FCC,* 886 F.2d 1325 (D.C. Cir. 1989). Because none of the courts invoking the impossibility exception had the assistance of a federal statute that specifically determined who had jurisdiction over the telecommunications area at issue, those courts had to

[19] Although the FCC claims it is merely seeking a joint role with the states in the ratemaking process under the Act, by requiring state commissions to employ the TELRIC methodology and its other assorted pricing mechanisms, the FCC is seeking to preempt any state pricing regulation that would employ a different methodology.

resort to analyzing the interstate/intrastate character of the telecommunications services, as required by sections 151 and 152 of the Communications Act, in order to make such a determination. Here, however, subsections 252(c)(2) and 252(d) clearly assign jurisdiction over the rates for the local competition provisions of the Act to the state commissions, thus avoiding the need to analyze the interstate/intrastate character of these services.

Even a traditional analysis of the interstate/intrastate quality of the local competition provisions of the Act reveals that these functions (i.e., interconnection, unbundled access, resale, and transport and termination of traffic) are fundamentally intrastate in character; thus the FCC's traditional jurisdiction over interstate communications will not be negated by the states' regulation of the rates for these services. The Act primarily focuses on facilitating competition in *local* telephone service markets by imposing several new duties (interconnection, unbundled access, and resale—the local competition provisions) on incumbent *local* exchange carriers. 47 U.S.C.A. § 251(c). Allowing competing telecommunications carriers to have direct access to an incumbent local exchange carrier's established network in order to enable the new carrier to provide competing general local telephone services is an intrastate activity even though the local network thus invaded is sometimes used to originate or complete interstate calls.[20] Contrary to the respondents' contentions,

[20] We note that the FCC's jurisdiction over the access charges that LECs collect from interexchange carriers (IXCs) for terminating the IXCs' interstate toll calls on the LECs' networks does not imply that the Commission also has jurisdiction over the rates that incumbent LECs may charge competing local exchange carriers for interconnection with or unbundled access to the incumbent LECs' networks. Interconnection and unbundled access are distinct from exchange access because interconection and unbundled access provide a requesting carrier with a direct hookup to and extensive use of an incumbent LEC's local network that enables a requesting carrier to provide local exchange services, while exchange access is a service that LECs offer to interexchange carriers without providing the interexchange carriers with such direct and pervasive access to the LECs' networks and without enabling the IXCs to provide local telephone service themselves through the use of the LECs' networks.

section 2(b) does not prevent the FCC from having jurisdiction only over matters that are purely intrastate. The Supreme Court rejected such a position in its decision in *Louisiana*:

> [W]e cannot accept respondents' argument that § 152(b) does not control because the plant involved in this case is used interchangeably to provide both interstate and intrastate service, and that even if § 152(b) does reserve to the state commissions some authority over "certain aspects" of intrastate communication, it should be "confined to intrastate matters which are 'separable from and do not substantially affect' interstate communication."

476 U.S. at 373 (citation omitted). Moreover, we reiterate that the text of section 2(b) itself indicates that the FCC does not have jurisdicion over matters "in connection with" intrastate service. 47 U.S.C. § 152(b). Consequently, the fact that the local competition provisions of the Act may have a tangential impact on interstate services is not sufficient to overcome the operation of section 2(b) and does not alter the fundamentally intrastate nature of the Act's local competition provisions. We note that the Act's clear grant of ratemaking authority to the state commissions is entirely consistent with the states' historical role in telecommunications regulation given the intrastate quality of the local competition provisions of the Act. Because the impossibility exception does not apply in this case, section 2(b) remains a *Louisiana*-built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the state's intrastate turf.

Having concluded that the FCC lacks jurisdiction to issue the pricing rules, we vacate the FCC's pricing

rules [21] on that ground alone and choose not to review these rules on their merits.

B. The FCC's "Pick and Choose" Rule

The petitioners next assert that the FCC's so-called "pick and choose" rule, 47 C.F.R. § 51.809, is an unreasonable interpretation of subsection 252(i). Subsection 252(i) provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C.A. § 252(i). With its "pick and choose" rule, the FCC interpreted this section of the Act to allow requesting carriers to "pick and choose" among *individual* provisions of other interconnection agreements that have previously been negotiated between an incumbent LEC and other requesting carriers without being required to accept the terms and conditions of the agreements in their entirety. The petitioners argue that such a rule is unduly burdensome on incumbent LECs and that it will thwart negotiations because it allows a later entrant to select the favorable terms of a prior approved agreement without being bound by the corresponding tradeoffs that were made in exchange for the favorable provisions sought by the new entrant. The petitioners assert that subsection 252(i) allows requesting carriers the option to select the terms and conditions of prior agreements only as a whole, not in a piecemeal fashion.

[21] The pricing rules refer to 47 C.F.R. §§ 51.501-51.515 (inclusive, except for section 51.515(b) which we found to be a legitimate interim rate for interstate access charges, *see Competitive Telecomm. Ass'n. v. FCC*, No. 96-3604, 1997 WL 352284, (8th Cir. June 27, 1997)), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive).

Because Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by Commercial Mobile Radio Service (CMRS) providers, *see* 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers, i.e., 47 C.F.R. §§ 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717, but only as these provisions apply to CMRS providers. Thus, rules 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717 remain in full force and effect with respect to the CMRS providers, and our order of vacation does not apply to them in the CMRS context.

Contrary to the FCC's belief that subsection 252(i) plainly mandates its approach, we think that the language of subsection 252(i) in isolation does not clearly reveal Congress's intent on this issue.[22] Consequently, we "must look to the structure and language of the statute as a whole" to determine if the FCC's interpretation of this ambiguous provision is a reasonable one. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). Our analysis leads us to conclude that the FCC's rule conflicts with the Act's design to promote negotiated binding agreements.

The structure of the Act reveals the Congress's preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements. Voluntary negotiation is the first method listed under section 252, and the Act indicates

[22] We acknowledge that the words "any interconnection, service, or network element" could indicate that the FCC's approach was intended by Congress. However, these words do not forecolse the possibility that an entrant's selection of an individual provision of a prior agreement would require it to accept the terms of the entire agreement. In this context, the quoted words could simply indicate that an incumbent LEC would not be able to shield an individual aspect of a prior agreement from the reach of a subsequent entrant who is willing to accept the terms of the entire agreement.

that the parties may begin negotiations as soon as an entrant submits a request to an incumbent LEC. 47 U.S.C.A. § 252(a)(1). Meanwhile, the parties' ability to request the arbitration of an agreement is confined to the period from the 135th to the 160th day after the requesting carrier submits its request to the incumbent LEC. *Id.* § 252(b)(1). These provisions reveal that the Act establishes a preference for incumbent LECs and requesting carriers to reach agreements independently and that the Act establishes state-run arbitrations to act as a backstop or impasse-resolving mechanism for failed negotiations.

The FCC's "pick and choose" rule, however, would thwart the negotiation process and preclude the attainment of binding negotiated agreements. During a negotiation, an incumbent LEC would be very reluctant to make a concession on one term in exchange for a benefit on another term when faced with the prospect that a subsequent competing carrier will be able to receive the concession without having to grant the incumbent the corresponding benefit. In this manner the FCC's rule would discourage the give-and-take process that is essential to successful negotiations Moreover, negotiated agreements will, in reality, not be binding, because, according to the FCC, an entrant who is an original party to an agreement may unilaterally incorporate more advantageous provisions contained in subsequent agreements negotiated by other carriers. *See* First Report and Order, ¶ 1316. This result conflicts with the Act's requirement that agreements be "binding," 47 U.S.C.A. § 252(a)(1), and is an additional impediment to subsequent negotions, because an incumbent LEC will be even more hesitant to make concessions in subsequent negotiations when it knows that such concessions would be available to all of the competing carriers with which it previously had agreements.

In response to these arguments, the FCC points to the waiver provision of the "pick and choose" rule, First Report and Order, § 51.809(b), and asserts that incumbent LECs will not be so deterred from making concessions because the waiver provision prevents an entrant from adopting the provisions of a previous agreement when an incumbent LEC can persuade a state commission that such adoption would be economically burdensome or technically infeasible. We do not believe, however, that the incumbent LECs can take solace in the waiver provision. With the burden of proof placed on the incumbent LECs, receiving an actual waiver would be an uphill battle that would likely be a rare occurrence. We remain convinced that even in light of the possibility that an exemption could be granted, the incumbent LECs' ability and willingness to negotiate would be severely stifled by the FCC's "pick and choose" rule.

We also find little merit to the Commission's assertion that the alternative interpretation of subsection 252(i), requiring entrants to accept the terms and conditions of prior agreements in their entirety, would cause incumbent LECs to include unrelated onerous terms in their agreements in order to discourage subsequent entrants from adopting those agreements. We believe that the incumbent LECs have as much interest in avoiding the costs of prolonged negotiations or arbitrations as do the requesting carriers, which gives the incumbent LECs an incentive to negotiate initial agreements that would be acceptable to a wide range of later requesting carriers.

We conclude that the FCC's interpretation conflicts with the Act's design to promote negotiated agreements. Thus, we find the FCC's "pick and choose" rule to be an unreasonable construction of the Act and vacate it for the foregoing reasons.

C. Rural Exemptions-Rule 51.405

A few petitioners take issue with the Commission's rule that establishes additional standards that the state commissions are to follow in determining whether rural and

small LECs are entitled to exemptions from or suspensions or modifications of the duties imposed on incumbent LECs generally under the Act. The Commission's rule, 47 C.F.R. § 51.405, purports to implement subsection 251(f), which governs exemptions, suspensions, and modifications. The rule allocates the burden of proof to the small or rural LECs seeking exemptions or modifications and embellishes the standard of proof to require the small or rural LECs to demonstrate that their compliance with the Act's local competition provisions would cause them to suffer an "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c). The petitioners attack the FCC's rule on both jurisdictional and substantive grounds. After carefully reviewing all of the pertinent arguments, we conclude that the FCC exceeded its jurisdiction in promulgating rule 51.405.

The plain meaning of subsection 251(f)(1) (governing exemptions) and 251(f)(2) (governing suspensions and modifications) indicates that the state commissions have the exclusive authority to make these determinations, and nothing in either of these provisions, or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations. Subsection 251(f)(1)(B) explicitly provides, "The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A)." Repeated and exclusive references to such state commission determinations are contained throughout subsection 251(f). In contrast, there is no indiction that state commissions must follow FCC standards in conducting these inquiries. The only reference to the Commission is contained in subsection 251(f)(1)(B) which provides, "Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations." The

FCC asserts that this sentence supplies it with the authority to promulgate rule 51.405. By its very terms, however, this sentence requires the implementation schedule to comply with the FCC's regulations only after a state commission has independently determined to terminate a rural LEC's exemption. This reference does not empower the FCC to establish standards that states must follow in determining in the first place whether an exemption should continue or end; it merely indicates that after a state commission decides to terminate an exemption, the rural carrier must comply with the regulations that the Commission is specically authorized to promulgate under section 251.[23]

The FCC responds by once again arguing that subsection 251(d)(1) of the Act authorizes it to promulgate regulations implementing all of the requirements contained in section 251 generally and that its broad rulemaking powers contained in subsections 154(i), 201(b), and 303(r) also provide it with the authority to issue rule 51.405. For the same reasons that we previously found these provisions to be insufficient to supply the FCC with jurisdiction to issue the pricing rules, we find them to be insufficient to empower the Commission to promulgate standards governing state commission determinations of exemptions and modifications. Moreover, the legislative history reveals that the Congress rejected both a Senate bill and a House bill that gave the FCC concurrent jurisdiction with state commissions to administer the exemption and waiver provisions. *See* S. Rep. No. 104-23, 1995 WL 142161 at *206-07 (§ 251(i)(3)) (1995); H.R. 1555, 104th Cong. § 242(e) (1995). It would be unreasonable to infer from subsection 251(d) or the other gen-

[23] To reiterate, the FCC is specifically authorized to issue regulations under subsections 251(b)(2) (number portability), 251(c)(4)(B) (limitations on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (continued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents).

eral rulemaking provisions cited by the FCC that Congress intended to put the Commission—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards governing the exemption process.

Finally, we believe that section 2(b) bars the FCC from having jurisdiction to issue rule 51.405 as well. The FCC's rule regulates the procedures involved in determining exemptions from and modifications of the small and rural LECs' duties to implement the local competition provisions of the Act contained in subsections 251(b) and 251(c). As explained earlier, these duties (e.g., interconnection, unbundled access, and resale) fundamentally involve local intrastate telecommunications services. We believe that determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions of such duties also qualify as practices or regulations "for or in connection with intrastate communication service" that are outside of the FCC's jurisdiction by the operation of section 2(b). 47 U.S.C. § 152(b). Furthermore, we find no straightforward or unambiguous grant of authority to the FCC with respect to these determinations that would be sufficient to overcome the section 2(b) fence. Therefore, we vacate rule 51.405 on the ground that the FCC exceeded its jurisdiction in promulgating this rule, and we decline to address the arguments attacking it on substantive grounds.

D. FCC Authority Under Section 208

In the discussion section of its First Report and Order, the FCC claims that its general authority to hear complaints under 47 U.S.C. § 208 empowers it to review agreements approved by state commissions under the Act and to enforce the terms of such agreements as well as the actual provisions contained in sections 251 and 252. *See* First Report and Order, ¶¶ 121-128. The Commission's perception of its authority under section 208 is unten-

able, however, in light of the language and structure of the Act and by the operation of section 2(b).

As an initial matter, the FCC argues that the issue of its complaint authority under section 208 is not ripe for review, because it did not promulgate an actual rule regarding this subject and it would be difficult to determine the actual boundaries of state and federal authority in an abstract setting. Despite the FCC's contentions, we believe that the issue is ripe for review. Congress has granted the courts of appeals jurisdiction to review all final orders of the FCC under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The fact that the FCC asserts its section 208 authority in the commentary section of its First Report and Order as opposed to stating its position as a rule is immaterial to our determination of ripeness. *See Office of Communication of United Church of Christ v. FCC*, 826 F.2d 101, 105 (D.C. Cir. 1987) (concluding that "whether an agency decision is labelled a 'Rule' or a 'Policy Statement' is of no consequence to the ripeness of the decision for review"). Instead, we focus on whether the agency's action is final, which requires us to determine if "the agency has completed its decisionmaking process." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). In paragraphs 127 and 128, the FCC definitively states that its authority to hear complaints under section 208 extends to disputes over the implementation of the requirements of sections 251 and 252. This statement and the contrary conclusions of several of the petitioners present us with conflicting interpretations of the statutory scheme's allocation of jurisdiction. This is a legal question that is ripe for our review.

The language and design of the Act indicate that the FCC's authority under section 208 does not enable the Commission to review state commission determinations or to enforce the terms of interconnection agreements under the Act. Instead, subsection 252(e)(6) directly provides

for federal district court review of state commission determinations when parties wish to challenge such determinations. 47 U.S.C.A. § 252(e)(6). The FCC responds by arguing that federal court review under subsection 252(e)(6) is not the exclusive remedy for a party aggrieved by state commission decisions under the Act and that such a party has the option of also filing a section 208 complaint with the FCC. Although the terms of subsection 252(e)(6) do not explicitly state that federal district court review is a party's "exclusive" remedy, courts traditionally presume that such special statutory review procedures are intended to be the exclusive means of review. *See Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989); *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979). We afford subsection 252(e)(6) our traditional presumption and conclude that it is the exclusive means to attain review of state commission determinations under the Act. Additionally, the complete absence of any reference to section 208 in the Act bolsters our conclusion that Congress did not intend to allow the FCC to review the decisions of state commissions.

We also believe that state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252. Subsection 252(e)(1) of the Act explicitly requires all agreements under the Act to be submitted for state commission approval. 47 U.S.C.A. § 252(e)(1) (West Supp. 1997). We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved. Moreover, the state commissions' enforcement power extends to ensuring that parties comply with the regulations that the FCC is specifically authorized to issue under the Act, because the Act empowers state commissions to reject arbitrated agreements on the basis that they violate the FCC's regulations. *See id.* at § 252(e)(2)(B). Again, we believe that

the power to approve or reject these agreements based on the FCC's requirements includes the power to enforce those requirements.[24] Significantly, nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements or the general provisions of sections 251 and 252. The only grant of any review or enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act. The FCC's expansive view of its authority under section 208 is thus contradicted by the language, structure, and design of the Act.

The FCC's inerpretation of its authority under section 208 also cannot survive the operation of section 2(b). As explained earlier, the obligations imposed by sections 251 and 252 fundamentally involve local intrastate telecommunications matters Consequently, the state commission determinations that the FCC seeks to review and the agreements that it seeks to enforce also fundamentally deal with intrastate telecommunications matters. To reiterate, section 2(b) prevents the FCC from having jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . ." 47 U.S.C. § 152(b). Allowing the FCC either to review state commission determinations regarding agreements implementing sections 251 and 252 or to enforce the terms of such agreements effectively would provide the FCC with jurisdiction over intrastate communication services in contravention of section 2(b). More specifically, such review or enforcement authority would enable the FCC to review and redetermine state commission determinations of the just and reasonable rates that incumbent LECs can charge their competitors for interconnection, unbundled access, and resale—rates that

[24] We believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6).

we previously decided were off limits to the FCC. We refuse to undermine our earlier decisions by interpreting the Act and section 208 as authorizing the FCC to review state commission determinations and to enforce state-approved agreements. We conclude that the language and structure of the Act combined with the operation of section 2(b) indicate that the provision of federal district court review contained in subsection 252(e)(6) is the exclusive means of obtaining review of state commission determinations under the Act and that state commissions are vested with the power to enforce the terms of the agreements they approve.

E. Rule 51.303-Review of Preexisting Agreements

Some petitions challenge the FCC's conclusion that subsection 252(a)(1) requires preexisting interconnection agreements that were negotiated before the enactment of the Telecommunications Act of 1996, including agreements between neighboring noncompeting LECs, to be submitted for state commission approval. *See* First Report and Order, ¶¶ 165, 166, 169; 47 C.F.R. § 51.303 (stating FCC's interpretation of subsection 252(a)(1)). While clearly requiring new agreements negotiated under the terms of the Act to be submitted for state commission approval, the last sentence of subsection 252(a)(1) reads, "The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C.A. § 252(a)(1). The petitioners objecting to the FCC's interpretation of this provision claim initially that the Commission does not have jurisdiction to determine which agreements must be submitted for approval under the Act; alternatively, they attack the Commission's determination on its merits, arguing that the FCC's rule violates the terms of the Act. Our review of the arguments leads us to conclude that the FCC exceeded its jurisdiction in promulgating rule 51.303.

Once again, section 2(b), 47 U.S.C. § 152(b), prevents the FCC from issuing regulations involving telecommunication matters that are fundamentally intrastate in character. As we explained above, the duties imposed by sections 251 and 252 and the agreements fulfilling those duties almost exclusively involve local intrastate telecommunication services. Consequently, section 2(b) forecloses the ability of the Commission to determine which interconnection agreements must be submitted for state commission approval.[25] Moreover, section 252 establishes the procedures and standards that *state commissions* must follow when approving and arbitrating agreements under the Act. Nothing in this section can be read to authorize the FCC to issue regulations regarding which interconnection agreements must be submitted for state approval. The FCC claims that subsection 252(d)(2)(B)(ii) implies that the Commission has the power to regulate generally under section 252 because this subsection "withdraws" authority from the FCC to regulate the costs associated with the transport and termination of calls; the FCC argues that there would be no need to withdraw this authority unless the FCC had such general authority to begin with. We are not persuaded that this subsection's denial (not withdrawal) of power to the FCC to determine the costs of transporting and terminating calls implies that the Commission has the authority to determine which intrastate interconnection agreements must be submitted for state approval under subsection

[25] We are cognizant of the fact that interconnection agreements negotiated prior to the enactment of the Telecommunications Act of 1996 may not necessarily share the same fundamental intrastate character as the agreements negotiated specifically under section 251 of the Act. This possibility does not circumvent the operation of section 2(b), however, because we are focusing on the FCC's authority *to determine* which agreements must be submitted for state commission approval in order to effectuate the local competition provisions in section 251. We believe that this determination qualifies as a "classification[ ]," "practice[ ]," or "regulation[ ] for or in connection with intrastate communication service" which is beyond the FCC's jurisdiction. 47 U.S.C. § 152(b).

252(a)(1). This grasp for some sort of statutorily-based jurisdiction over these interconnection agreements does not qualify as the straightforward grant of intrastate authority that is necessary to penetrate the section 2(b) fence.

We also are not convinced by the FCC's familiar refrain that its general rulemaking authority under 47 U.S.C. §§ 201(b), 303(r), and 154(i) provides it with jurisdiction to regulate in this area. For the reasons explained above, these general rulemaking provisions do not grant the Commission rulemaking authority beyond what is necessary to fulfill its obligations with regard to traditional interstate and foreign communications. Additionally, none of these provisions supply the FCC with a sufficiently unambiguous grant of intrastate authority to overcome the operation of section 2(b). Consequently, we vacate Rule 51.303 and its accompanying policy statements on the ground that the Commission did not have jurisdiction to issue this regulation.[26]

F. § 251(d)(3) and State Compliance With FCC Rules

In the commentary portion of the First Report and Order, the FCC asserts that "the Commission's regulations under section 251 are binding on the states, even with respect to intrastate matters." First Report and Order, ¶ 101. With this statement, as well as several others, the FCC purports to preempt any state policy that conflicts with an FCC regulation promulgated pursuant to section 251. *See id.* at ¶¶ 101-103, 180. The petitioners argue that the FCC's position is untenable in light of subsection 251(d)(3) and the structure of the Act. We agree.

[26] We emphasize that our conclusion that the FCC exceeded its jurisdiction in promulgating Rule 51.303 in no way reflects any view of the merits of the Commission's interpretation of subsection 252(a)(1), and we leave the determination of whether and which preexisting interconnection agreements must be submitted for state commission approval to the state commissions.

Subsection 251(d)(3), entitled "Preservation of State access regulations," provides the following:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—
>
> (A) establishes access and inter-connection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C.A. § 251(d)(3). Initially, we note that the FCC's authority to prescribe and enforce regulations to implement the requirements of section 251 is confined to the six areas in this section where Congress expressly called for the FCC's participation. *See supra* note 10 and accompanying text. Subsection 251(d)(3) further constrains the FCC's authority. Even when the FCC issues rules pursuant to its valid rulemaking authority under section 251, subsection 251(d)(3) prevents the FCC from *preempting* a state commission order that establishes access and interconnection obligations so long as the state commission order (i) is consistent with the requirements of section 251 and (ii) does not substantially prevent the implementation of the requirements of section 251 and the purposes of Part II, which consists of sections 251 through 261. This provision does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251. The FCC attempts to read such a requirement into this subsection by asserting that a state policy that is inconsistent with an FCC regulation is necessarily also inconsistent with the terms of section 251 and substantially prevents the im-

plementation of section 251. *See* First Report and Order, ¶¶ 102-103. The FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.

The FCC asserts that other provisions of the Act justify its belief that state interconnection and access rules must be consistent with the Commission's regulations under section 251. The FCC claims that section 253 and subsections 252(c)(1) and 261(c) indicate that state commissions are bound by the FCC's regulations. While subsection 253(d) does empower the Commission to preempt some state policies, those state policies are limited to those that violate the terms of subsections 253(a) or 253(b). 47 U.S.C.A. § 253(d). Neither subsection 253(a) nor 253(b) requires state policies to conform to any Commission regulations, 253(a) merely requires state policies not to prohibit "the ability of any entity to provide any interstate or intrastate telecommunications service," and 253(b) allows states to impose additional telecommunications requirments as long as they are competitively neutral and consistent with the universal service obligations of section 254. *Id.* § 253(a), (b). Meanwhile, subsection 252(c)(1) does require state commissions to ensure that arbitrated agreements comply with the Commission's regulations made pursuant to section 251, but by its very terms this provision confines the states only when they are fulfilling their roles as arbitrators of agreements pursuant to the federal Telecommunications Act of 1996. This provision does not apply to state statutes or regulations that are independent from the Telecommunications Act of

1996. Many states enacted legislation designed to open up local telephone markets to competition prior to the 1996 federal Act, *see Iowa Utilities Bd.*, 109 F.3d at 427 n.7, and subsection 251(d)(3) was designed to preserve such work of the states.

Finally, the FCC claims that subsection 261(c) provides support for its conclusion that the state regulations must be consistent with the Commission's rules on interconnection and access promulgated under section 251. While subsection 261(c) does require some state rules to be consistent with "the Commission's regulations to implement this part," we believe that this provision applies only to those additional state requirements that are *not* promulgated pursuant to section 251 or any other section in Part II of the Act. *See* 47 U.S.C.A. § 261(c). Because subsection 251(d)(3) specifically governs state rules that "establish[] access and interconnection obligations of local exchange carriers," which is the heart of the subject matter of section 251, and subsection 261(b) governs state rules that are issued to "fulfill[] the requirements of this part," we conclude that the additional state requirements referenced in subsection 261(c) refer to separate state rules that do not directly pertain to the matters found in sections 251 through 261 (Part II) of the Act. Consequently, this provision does not apply to the state rules pertaining to interconnection and access obligations that the Commission believes it has the power to preempt under its section 251 authority, and thus, it does not support the FCC's view that such state rules must conform to the Commission's regulations.

The FCC's blanket statement that state rules must be consistent with the Commission's regulations promulgated pursuant to section 251 is not supportable in light of subsection 251(d)(3).[27] With subsection 251(d)(3), Con-

[27] We leave for another day any determination of whether a *specific* state access or interconnection regulation is inconsistent

gress intended to preserve the states' traditional authority to regulate local telephone markets and meant to shield state access and interconnection orders from FCC preemption so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of section 251 or the purposes of Part II. We conclude that the FCC's belief that merely an inconsistency between a state rule and a Commission regulation under section 251 is sufficient for the FCC to preempt the state rule, is an unreasonable interpretation of the statute in light of subsection 251(d)(3) and the structure of the Act.[28] *See Chevron*, 467 U.S. at 844-45 (standard of review).

G. The FCC's Unbundling Rules

The FCC issued many rules purporting to implement the incumbent LECs' duties to provide unbundled access to the incumbent LECs' network under subsection 251 (c)(3). The petitioners challenge these rules on multiple grounds ranging from assertions that particular rules violate the terms of the Act to claims that these rules altogether effect an unconstitutional taking of the incumbent LECs' property. We address these challenges to the FCC's unbundling rules one by one.

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with section 251 or substantially prevents the implementation of section 251 or Part II of the Act.

[28] Our decision rejecting the FCC's board preemption of all state regulations that conflict with the FCC's rules under section 251 does not render the FCC's rules meaningless, however. The FCC's rules under section 251 will be in force where there are no comparable state rules on access and interconnection obligations, or where such state rules conflict with the substantive provisions of section 251 or substantially prevent their implementation.

1. The Unbundling Rules in Light of the Terms of the Act

a. OSS, Operator Services, and Vertical Switching Features

Many of the petitioners claim that the FCC's decision to require incumbent LECs to provide competitors with unbundled access to operational support systems (OSS), 47 C.F.R. § 51.319(f), operator services and directory assistance, *Id.* § 51.319(g), and vertical switching features such as caller I.D., call forwarding, and call waiting, First Report and Order, ¶¶ 263, 413, unduly expands the incumbent LECs' unbundling obligations beyond the statutory requirements. After reviewing the relevant provisions of the Act, we believe that the FCC reasonably concluded that these features qualify as network elements that are subject to the unbundling requirements of the Act.

Subsection 251(c)(3) imposes a duty on incumbent LECs to provide competing carriers with "access to network elements on an unbundled basis. . . ." 47 U.S.C.A. § 251(c)(3). In turn, the Act provides the following definition of "network element":

> The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

Id. § 153(29). The petitioners suggest that the first sentence of this definition limits a "network element" to only the physical parts of an incumbent LEC's network that are directly involved in transmitting telephone calls from one point to another. They also contend that the second sen-

tence's apparent expansion of the definition is actually confined by the fact that the additional "features, functions and capabilities" are limited to those "that are provided by means of such facility or equipment." Furthermore, the petitioners suggest that the Conference Committee's deletion of the term "services" from the unbundling provision contained in an earlier House bill indicates that any aspect of telecommunications that can be characterized as a "service" is not a network element subject to unbundling. *See* H.R. 1555, 104th Cong. § 242(a)(2) (1995).

Applying their narrow interpretation of the definition of "network element," the petitioners assert that operational support systems, which are software systems and accompanying databases that are necessary to process orders, handle billing, and provide maintenance and repair capabilities to phone customers, are not physical components of an incumbent LEC's network that are directly involved in transmitting a phone call from one person to another and thus do not qualify as "network elements." The petitioners reject operator services and directory assistance as well as call waiting, caller I.D., and call forwarding as network elements for the same reasons and for the additional reason that these features are "services" that were not intended to be subject to the unbundling requirements. We reject the petitioners' narrow interpretation of the Act's definition of "network element" and believe that all of these provisions qualify as network elements under the Act.

Initially, the Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B. The Act specifically provides that "[t]he term 'network element' means a facility or equipment used in the provision of a telecommunications service." 47 U.S.C.A. § 153(29). Significantly, the Act defines "telecommunications service" as meaning "the offering of telecommunications for a fee directly to the public." *Id.*

§ 153(46). Given this definition, the offering of telecommunications services encompasses more than just the physical components directly involved in the transmission of a phone call and includes the technology and information used to facilitate ordering, billing, and maintenance of phone service—the functions of operational support systems. Such functions are necessary to provide telecommunications "for a fee directly to the public." *Id.* We believe that the FCC's determination that the term "network element" includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference. *See Chevron,* 467 U.S. at 844.

Additionally, the second sentence of subsection 153 (29) substantially broadens the definition of "network element," and its explicit reference to "databases, signaling systems, and information sufficient for billing and collection" clearly indicates that operational support systems qualify as network elements under the Act. We are not persuaded that operational support systems are excluded from the definition of network elements merely because the referenced "features, functions, and capabilities" are limited to those "that are provided by means of such facility or equipment." *Id.* § 153(29). Above, we demonstrated that "facilities or equipment" used in the provision of a telecommunication service encompasses a broad range of telecommunications technology and devices, including operational support systems, so the status of these systems as network elements is not dependent on the terms of the definition's second sentence. Nevertheless, we believe that operational support systems alternatively qualify as network elements under the terms of the definition's second sentence, because the information and databases of these systems constitute features, functions, and capabilities that are provided through the use of software and hardware that is used in the commercial offering of telecommunication services to the public. Moreover, even though the definition limits the

general terms "features, functions, and capabilities" to those "that are provided by means of such facility or equipment," the definition definitively declares that subscriber numbers, databases, signaling systems, and information sufficient for billing and collection qualify as such features, functions, and capabilities, and thus are network elements under the Act. Operational Support Systems consist of databases and information relevant to ordering and billing; thus, they qualify as network elements under this definition as well.

Our agreement with the FCC's determination that the Act broadly defines the term "network element" leads us also to agree with the Commission's conclusion that operator services, directory assistance, caller I.D., call forwarding, and call waiting are network elements that are subject to unbundling. We believe that operator services and directory assistance qualify as features, functions, or capabilities that are provided by facilities and equipment that are used in the provision of telecommunication services. The commercial offering of phone services to the public and the specific transmission of phone calls between locations implicates the use of operator services and directory assistance. Likewise, caller I.D., call waiting, and call forwarding are vertical "features" that are provided through the switching hardware and software that are also used to transmit calls across phone lines. Thus, they qualify as network elements as well.

The petitioners argue that these features are actually finished services and that the legislative history and structure of the Act suggest that "services" were not meant to be unbundled but rather sold to the requesting carrier for resale under subsection 251(c)(4). While we address this argument in greater detail in a subsequent section of this opinion, with respect to these particular features, we disagree with the petitioners' interpretation of the Act. Simply because these capabilities can be labeled as "services" does not convince us that they were not intended

to be unbundled as network elements. While subsection 251(c)(4) does provide for the resale of telecommunications services, it does not establish resale as the exclusive means through which a competing carrier may gain access to such services. We agree with the FCC that such an interpretation would allow the incumbent LECs to evade a substantial portion of their unbundling obligation under subsection 251(c)(3). We believe that in some circumstances a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale. Regarding the features presently at issue, as explained above, these aspects of telecommunications satisfy the definition of "network element;" consequently, they are subject to the unbundling requirements of subsection 251(c)(3).[29]

b. Definition of "Technically Feasible"-Rule 51.5

Subsections 251(c)(2) and 251(c)(3) direct interconnection and unbundled access to occur "at any technically feasible point." 47 U.S.C.A. §§ 251(c)(2), (3). In its definition of "technically feasible," the FCC states, "A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns. . . ." 47 C.F.R. § 51.5. One petitioner claims that the FCC's exclusion of economic concerns from such determinations is unreasonable. The petitioner fears that ignoring the economic costs of points of interconnection or unbundled access could result in incumbent LECs having to incur unwarranted expenses in order to meet the demands of competing carriers seeking access to their networks. We, however, believe that the FCC's definition of "technically feasible" is reasonable and entitled to deference. Although economic concerns are not

[29] Even though the parties seem to agree that operator services, directory assistance, caller I.D., call forwarding, and call waiting can also be classified as "services," we make no ruling on this particular issue.

to be considered in determining if a point of interconnection or unbundled access is technically feasible, the costs of such interconnection or unbundled access will be taken into account when determining the just and reasonable rates, terms, and conditions for these services. *See* 47 U.S.C.A. §§ 251(c)(2), (3). Under the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests. Consequently, we conclude that the FCCs definition of "technically feasible" will not unduly burden the incumbent LECs, and we uphold the Commission's definition.

c. Technically Feasible and the Presumption for Unbundling

Many petitioners also challenge the FCC's general standards that it proposes be used in determining what network elements must be unbundled. One such standard is the FCC's belief that incumbent LECs presumably must provide unbundled access to "all network elements for which it is technically feasible to provide access on an unbundled basis." First Report and Order, ¶ 278. A finding that it is technically feasible to unbundle a particular element creates a presumption that the element must be unbundled according to the FCC. *See id.*, ¶ 281; 47 C.F.R. § 51.317. Although we just upheld the Commission's definition of the term "technically feasible," we reject the Commission's use of this term to determine what elements must be unbundled. As mentioned above, subsection 251(c)(3) places a duty on incumbent LECs to provide "access to network elements on an unbundled basis at any technically feasible point." By its very terms, this provision only indicates *where* unbundled access may occur, not *which* elements must be unbundled. Subsection 251(d)(2) establishes the standards to determine which elements must be unbundled, and this subsection makes no reference to technical feasibility. We think that the FCC's interpretation that an element for which unbundling is technically feasible must presumably be unbundled is contrary to the plain meaning of the Act and cannot stand. *See Chevron*, 467 U.S. at 842-43.[30]

d. The "Necessary" and "Impair" Standards

While subsection 251(d)(2) does not mention technical feasibility as a relevant factor in determining what network elements should be unbundled, it does require the Commission to consider whether access to a network element that is proprietary in nature is "necessary" and whether the failure to provide access to a network element would "impair the ability of the telecommuncations carrier seeking access to provide the services that it seeks to offer." 47 U.S.C.A. § 251(d)(2)(A), (B). The petitioners argue that the FCC's view of these standards is so broad that it essentially reads these requirements out of the statute. We disagree and believe the Commission reasonably interpreted these standards.

Several petitioners assert that the FCC unreasonably decided that the "necessary" and "impairment" standards in subsection 251(d)(2) do not require an evaluation of whether a requesting carrier could obtain the desired elements from an alternative source. *See* First Report and Order, ¶ 283. The petitioners believe that if a requesting carrier could obtain access to an element from a source other than an incumbent LEC, then that element is not "necessary," nor would the incumbent LEC's failure to provide access to such an element "impair" the ability of the requesting carrier to provide telecommunications service. Despite the petitioners' arguments to the contrary, we think the FCC reasonably determined that the "necessary" and "impairment" standards in subsection 251(d)(2) do not require an inquiry into whether a com-

[30] We vacate only the portion of 47 C.F.R. § 51.317 and the portions of paragraphs 278 and 281 of the FCC's First Report and Order that create the presumption that a network element must be unbundled if it is technically feasible to do so.

peting carrier could obtain the element from another source. Subsection 251(c)(3) requires incumbent LECs to provide competing carriers with fairly generous unbundled access to their network elements in order to expedite the arrival of competition in local telephone makets. Allowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually. The Act, however, provides for unbundled access to incumbent LECs' network elements as a way to jumpstart competition in the local telecommunications industry. Thus, we do not think the Commission erred in rejecting the proposal that an element need not be unbundled if a carrier could obtain access to it from another source.

We also believe that the FCC's actual interpretations of the "necessary" and "impairment" standards are reasonable. Under subsection 251(d)(2)(A), the Commission determined that an element proprietary in nature would be "necessary" if a requesting carrier's ability to compete would be "significantly impaired or thwarted" without it. First Report and Order, ¶ 282. The petitioners claim that this articulation is too broad and that "necessary" should be read narrowly to mean "indispensable" or "absolutely required." They also argue that the FCC's expansive interpretation will result in competing carriers having such broad access to incumbent LECs' networks that the incentive to innovate will be drastically reduced. We are not persuaded by the petitioners' arguments.

While in some contexts the petitioners' narrow definition of "necessary" may be accurate, courts have at times interpreted this term more liberally to mean "convenient, or useful." *See M'Culloch v. Maryland*, 17 U.S. 316, 413 (1819). On one occasion the Supreme Court specifically rejected reading the term "necessary" to mean "indispen-

sable," "essential," or "vital" because such a reading would have been too rigid for a word that should "be harmonized with its context." *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944). In light of this Act's purpose of promoting competition in local telephone markets, we believe that the FCC's interpretation of "necessary" is a reasonable one and entitled to deference. *See Chevron*, 467 U.S. at 84⅘. An overly strict reading of the word "necessary," as the petitioners propose, would unduly restrict the unbundling duty of incumbent LECs and hinder the development of competition in the local telecommunications industry. Although the Commission's definition is broader than the petitioners', it is not toothless. A requesting carrier must demonstrate that without access to a particular proprietary element its ability to compete would be "significantly impaired or thwarted."[31] First Report and Order, ¶ 282. Moreover, under the Commissions rules, an incumbent LEC will not be forced to provide unbundled access to a proprietary network element if the requesting carrier could offer the same service through the use of the incumbent LEC's nonproprietary network elements.[32] *See* 47 C.F.R. § 51.317(b). These

[31] The Commission's use of the word "impaired" in defining what proprietary elements are necessary does not inappropriately conflate the "necessary" standard of subsection 251(d)(2)(A), applicable to proprietary elements, with the "impairment" standard of subsection 251(d)(2)(B), applicable to network elements in general. The requirement that a new entrant must demonstrate that its "ability to compete would be *significantly* impaired or *thwarted*" without access to proprietary elements, First Report and Order, ¶ 282 (emphasis added), is a higher standard to meet than the FCC's standard for nonproprietary elements, which merely requires a showing that denial of unbundled access to such elements would decrease the quality or increase the cost of the service sought to be offered by the requesting carrier. *See* First Report and Order, ¶ 285.

[32] This limitation on a requesting carrier's ability to gain unbundled access to an incumbent LEC's proprietary elements also serves to distinguish the "necessary" standard from the impairment standard as discussed in the previous footnote.

restrictions on the FCC's definition of "necessary" also persuade us that innovations will continue to occur under the FCC's rules. We agree with the Commission's belief that the procompetitive effects of unbundling under the Commission's rules could spur enough innovation to offset any potential reduction in innovation that the unbundling standard might cause. Consequently, we uphold the FCC's interpretation of the "necessary" standard.

For similar reasons we also uphold the Commission's articulation of the "impairment" standard under subsection 251(d)(2)(B). The Commission determined that a requesting carrier's ability to provide a particular service will be impaired "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." First Report and Order, ¶ 285. The petitioners offer a more restrictive definition that would require competing carriers to demonstrate that their technical capability to provide a service would be diminished without unbundled access to a particular element. While the petitioners' alternative may be plausible, dictionaries consistently define the word "impair" to mean "to make worse" or "to diminish in . . . value." *See, e.g., Webster's Third New International Dictionary* 1131 (1986); *Webster's New World Dictionary* 703 (2d ed. 1970). If the quality of the service declines or the cost of providing the service rises as a result of a requesting carrier's inability to gain access to a network element, then the requesting carrier's ability to provide the service has been made worse. The FCC's interpretation of the "impairment" standard is reasonable, and we give it deference. *See Chevron*, 467 U.S. at 844.

e. Superior Quality-Rules 51.305(a)(4), 51.311(c)

Another source of disagreement between the petitioners and the FCC arises over the Agency's decision to require incumbent LECs to provide interconnection, unbundled network elements, and access to such elements at levels of quality that are superior to those levels at which the incumbent LECs provide these services to themselves, if requested to do so by competing carriers. *See* 47 C.F.R. §§ 51.305(a)(4), 51.311(c). Here, we believe that the FCC violated the plain terms of the Act when it issued these rules.

Subsection 251(c)(2)(C) requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . . ." Plainly, the Act does not require incumbent LECs to provide its competitors with superior quality interconnection. Likewise, subsection 251(c)(3) does not mandate that requesting carriers receive superior quality access to network elements upon demand. The FCC argues that the terms "*at least* equal in quality" permit the provision of superior quality interconnection; it believes that the nondiscrimination requirements in both subsections 251(c)(2) and 251(c)(3) require incumbent LECs to provide superior quality interconnection and network elements when requested; and it asserts that the provision of superior quality interconnection and network elements will not unduly burden the incumbent LECs, because the requesting carriers will have to pay for these services. We are not convinced by the Commission's justifications for these rules.

While the phrase "at least equal in quality" leaves open the possibility that incumbent LECs may agree to provide interconnection that is superior in quality when the parties are negotiating agreements under the Act, this phrase mandates only that the quality be equal—not superior. In other words, it establishes a floor below which the quality of the interconnection may not go. Because the Commission's rule *requires* superior quality interconnection when requested, *see* 47 C.F.R. § 51.305(a)(4), the rule is not supported by the Act's language. We also agree with the petitioners' view that subsection 251(c)(3) implicitly re-

quires unbundled access only to an incumbent LEC's *existing* network—not to a yet unbuilt superior one. Additionally, the nondiscrimination requirements contained in these subsections of the Act do not justify these FCC rules. The fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier. Finally, the fact that incumbent LECs may be compensated for the additional cost involved in providing superior quality interconnection and unbundled access does not alter the plain meaning of the statute, which, as we have shown, does not impose such a burden on the incumbent LECs. Therefore, we conclude that sections 51.305(a)(4) and 51.311(c) cannot stand in light of the plain terms of the Act.[83]

f. Combination of Network Elements

We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on an unbundled basis, 47 C.F.R. § 51.315 (c)-(f), cannot be squared with the terms of subsection 251(c)(3). The last sentence of subsection 251(c)(3) reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in

[83] Although we strike down the Commission's rules requiring incumbent LECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." First Report and Order, ¶ 198. The petitioners themselves appear to acknowledge that the Act requires some modification of their facilities. (*See* Reply Br. of Regional Bell Companies and GTE at 40.)

order to provide such telecommunications service." 47 U.S.C.A. § 251(c)(3) (emphasis added). This sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements. The FCC and its supporting intervenors argue that because the incumbent LECs maintain control over their networks it is necessary to force them to combine the network elements, and they believe that the incumbent LECs would prefer to do the combining themselves to prevent the competing carriers from interfering with their networks. Despite the Commission' arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do *all* of the work. Moreover, the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them. Consequently, we vacate rule 51.315 (c)-(f) as well as the affiliated discussion sections.

g. Obtaining Finished Services Through Unbundled Access

The petitioners next engage in a broad-based attack on the bulk of the FCC's unbundling rules by arguing that the Commission's conclusion that the requesting carriers may obtain the ability to provide finished telecommunications services entirely by acquiring access to the unbundled elements of an incumbent LEC's network violates the terms and structure of the Act. *See* First Report and Order, ¶¶ 328-341 (stating the Commission's position). The petitioners contend that while subsection 251(c)(3) allows new entrants access to an incumbent LEC's network elements on an unbundled basis, it does

not enable new entrants to provide telecommunications services to the public entirely by acquiring all of the necessary elements on an unbundled basis from an incumbent LEC. The petitioners assert that a competing carrier should own or control some of its own local exchange facilities before it can purchase and use unbundled elements from an incumbent LEC to provide a telecommunications service. The petitioners argue that subsection 251(c)(4) makes resale the exclusive means to offer finished telecommunications services for competing carriers that do not own or control any portion of a telecommunications network. Furthermore, the petitioners point out that under subsection 251(c)(4) a competing carrier may purchase the right to resell a telecommunications service from an incumbent LEC only at wholesale rates. Under subsection 252(d)(1), however, a competing carrier may obtain unbundled access to an incumbent LEC's network elements at a less expensive cost-based rate. The petitioners then argue that by allowing a competing carrier to obtain the ability to provide finished telecommunications services entirely through unbundled access at the less expensive cost-based rate, the FCC enables competing carriers to circumvent the more expensive wholesale rates that the Act requires for telecommunications services, and thereby nullifies the terms of subsection 251(c)(4). Additionally, the petitioners claim that by being able to obtain the ability to provide services at cost under subsection 251(c)(3), competing carriers will be able to capture many of the incumbent LEC's customers to whom the incumbent LECs are expected to charge high prices for certain services to offset the low prices incumbent LECs are required to charge other customers in order to promote universal service. The petitioners claim that the competing carriers will simply offer the same services to these particular customers at lower rates and capture a significant share of the market ("cherry-picking") without achieving any true gain in efficiency or technology. Finally, the petitioners contend

that the FCC's view of subsection 251(c)(3) allows carriers to circumvent the Act's restriction on joint marketing of local and long-distance services contained in subsection 271(e)(1). This is because subsection 271(e)(1) prohibits a carrier's joint marketing only of local service obtained under subsection 251(c)(4) (resale) with the carrier's ability to provide long-distance service. 47 U.S.C.A. § 271(e)(1). It does not apply to local service that a competing carrier achieves under subsection 251(c)(3) (unbundled access). Despite the petitioners' extensive arguments to the contrary, we believe that the FCC's determination that a competing carrier may obtain the ability to provide telecommunications services entirely through an incumbent LEC's unbundled network elements is reasonable, especially in light of our decisions regarding the validity of other specific FCC rules.

Initially, we believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network. Nothing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements. To the contrary, this subsection imposes a duty on incumbent LECs to provide unbundled access "to *any* requesting telecommunications carrier for the provision of a telecommunications service." 47 U.S.C.A. § 251(c)(3) (emphasis added). The petitioners contend that the terms of subsection 251(c)(3) only allow a requesting carrier access to unbundled elements and that a carrier who obtains an entire network is getting more than *elements* on an *unbundled* basis. The additional terms of this subsection, however, expressly contemplate that competing carriers will use these elements to provide finished services. The last sentence of this subsection reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers

to combine such elements in order to provide such telecommunications service." *Id.* Our previous ruling finding that this language does not require an incumbent LEC to combine the elements for a requesting carrier establishes that requesting carriers will in fact be receiving the elements on an unbundled basis. We now decide merely that under subsection 251(c)(3) a requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications services.

We do not believe that this interpretation of subsection 251(c)(3) will cause all requesting carriers to select unbundled access over resale as their preferred route to enter the local telecommunications market. Although a competing carrier may obtain the capability of providing local telephone service at cost-based rates under unbundled access as opposed to wholesale rates under resale, unbundled access has several disadvantages that preserve resale as a meaningful alternative. Carriers entering the local telecommunications markets by purchasing unbundled network elements face greater risks than those carriers that resell an incumbent LEC's services. A reseller can more easily match its supply with its demand because it can purchase telephone services from incumbent LECs on a unit-by-unit basis. Consequently, a reseller is able to purchase only as many services (or as much thereof) as it needs to satisfy its customer demand. Again providing services through unbundled access, however, must make an up-front investment that is large enough to pay for the cost of acquiring access to all of the unbundled elements of an incumbent LEC's network that are necessary to provide local telecommunications services without knowing whether consumer demand will be sufficient to cover such expenditures. Moreover, our decision requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled

access as a method of entering the local telecommunications industry and simultaneously makes resale a distinct and attractive option. With resale, a competing carrier can avoid expending valuable time and resources recombining unbundled network elements.

Given the disadvantages of completely relying on unbundled access as a means to provide local telecommunications services, we believe that many new entrant carriers will choose to resell such services under subsection 251(c)(4). Consequently, we do not believe that incumbent LECs will lose all of the customers to whom they charge higher prices in order to fulfill their current universal service obligations. The increased risk and the additional cost of recombining the unbundled elements will hinder the ability of competing carriers to undercut these prices and lure these customers away from the incumbent LECs.[34] Nor do we believe that subsection 271(e)(1)'s limitation on the joint marketing of local services with long-distance services will be meaningless. Given the downsides of entering the local telecommunications market through unbundled access, we agree with the Commission's conclusion that some long-distance carriers will choose to enter local exchange markets through the resale provisions, subject to the joint marketing restriction, rather than assume the risks and burdens associated with unbundled access. We conclude that the Commission's belief that competing carriers may obtain the ability to provide fin-

[34] To the extent that some incumbent LEC customers decide to switch to competing carriers, we believe this result is entirely consistent with the Act's purpose to promote competition in local phone markets. Additionally, section 254 of the Act, entitled "Universal Service," reveals Congress's intent to overhaul the current system of support for universal service, which is based on the incumbent LECs' supracompetitive prices for certain service. *See* 47 U.S.C.A. § 254. In fact, the FCC has recently issued its plan to reform the universal service support system. *See* Report and Order, Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (May 8, 1997).

ished telecommunications services entirely through the unbundled access provisions in subsection 251(c)(3) is consistent with the plain meaning and structure of the Act.

2. The Unbundling Rules and the Purpose of the Act

Several of the petitioners vaguely argue that the FCC's unbundling rules in combination provide competing carriers with such extensive access to the incumbent LEC's networks that they will thwart the Act's principal purpose, which, according to the petitioners, is to promote facilities-based competition and innovation in telecommunications technology. The petitioners claim that under these rules, competing carriers will have no incentive to construct their own facilities because they will be able to earn substantial profits by relying entirely on the incumbent LECs' networks to provide services to their customers. They also assert that neither the competing carriers nor the incumbent LECs will attempt to innovate their technology because the Commission's supposedly broad unbundling rules force a carrier to share such advances in technology with its competitors. We reject these claims and believe that the Commission's rules that we have found to be consistent with the terms of the Act are also consistent with the purpose of the Act.

Initially we note that the petitioners' arguments are generally based on the assumption that the FCC's unbundling rules would operate in conjunction with the Commission's proposed pricing rules. The petitioners have argued that the Commission's pricing rules would result in rates that are unreasonably low, making it inexpensive and thus highly profitable for competing carriers to provide local telecommunications services exclusively through the use of an incumbent LEC's network. In these circumstances, the petitioners argue, competing carriers would have no incentive to build their own network facilities. We have, however, vacated the FCC's pricing rules and determined that

the Act requires state commissions to set the rates that competing carriers must pay for access to incumbent LECs' networks. Since we do not know what the state-determined rates will be, the petitioners' argument that competing carriers will incur only minimal costs in gaining access to incumbent LECs' networks and have no incentive to build their own is merely speculative at best.[35]

Even if the states establish "inexpensive" rates, we do not think that the Commission's unbundling rules would violate the Act's purpose, because, after study, we do not believe that the Act's exclusive goal is facilities-based competition. While Congress may have envisioned facilities-based competition in local telephone markets to occur down the road, Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry. *See* H.R. Rep. No. 104-204, 1995 WL 442504 at *202-03, 494 (1995) (explaining importance of resale provision for the early development of competition and indicating that the local competition provisions "create the transition to a more competitive marketplace"). Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business. The Commission's unbundling rules facilitate the competing carriers' access to these networks and thus promote the Act's additional purpose—the expeditious introduction of competition into local phone markets.

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[35] We recognize that the Act requires interconnection and network element charges to be based on cost, but we note that the Act also indicates that these rates "may include a reasonable profit" for the incumbent LECs. 47 U.S.C.A. § 252(d)(1).

At the same time, we do not believe that the unbundling rules will hinder the development of facilities-based competition or impede innovation in telecommunications. Initially, we note that we have already vacated, on alternative grounds, several of the unbundling rules that the petitioners claim violate the purpose of the Act. *See* 47 C.F.R. §§ 51.305(a)(4) (interconnection superior in quality), 51.311(c) (network elements superior in quality), 51.315 (combination duty on incumbent LECs). Consequently, the degree and ease of access that competing carriers may have to incumbent LECs' networks is not as extensive as envisioned by the petitioners and far less than the amount of control that a carrier would have over its own network. We have upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into local phone markets by requiring incumbent LECs to make their networks available to their competing carriers. Even in light of the unbundling rules, we believe that competing carriers will continue to have incentives to build their own networks. Once a new entrant has established itself and acquired a sufficient customer base to justify investments in its own facilities, a carrier that develops its own network gains independence from incumbent LECs and has more flexibility to modify its network elements to offer innovative services. Additionally, as we stated earlier, we believe that the competitive environment that these unbundling rules create will result in more technological innovation than what occurs in the current monopolistic local telecommunications markets. We believe that the increased incentive to innovate resulting from the need of a carrier to differentiate its services and products from its competitors' in a competitive market will override any theoretical decreased incentive to innovate resulting from the duty of a carrier to allow its competitors access to its network elements. We thus conclude that the Commission's unbundling rules do not subvert the Act's purposes.

3. The Unbundling Rules in Light of the Intellectual Property Rights of Third Parties

Several petitioners claim that the FCC's unbundling rules as a whole infringe on the intellectual property rights of third parties[36] who license their technology to incumbent LECs for use in the LECs' networks. In particular, the petitioners claims that by allowing requesting carriers "exclusive use" of an incumbent LEC's unbundled network element for a limited period of time, *see id.*, § 51.309, the FCC's rules could potentially result in violations of license agreements between incumbent LECs and third party manufacturers of software and other telecommunications technology. Additionally, the petitioners argue that such a result would constitute a taking of the third party's intellectual property without just compensation in violation of the Fifth Amendment. While we are skeptical of the merits of such claims,[37] we believe that the speculative nature of these arguments indicates that neither the intervenor nor the petitioners presently have standing to raise these claims.

In order to have standing to bring a claim, a party must, among other things, have suffered an injury in fact which the Supreme Court describes as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations, citations, and footnote omitted). With respect to this claim, neither the intervenor nor the petitioners have demonstrated that the FCC's unbundling rules will, in fact, enable requesting

[36] One group of such third parties, the Ad Hoc Coalition of Telecommunications Manufacturing Companies, asserts this claim on its own behalf as an intervenor in this case.

[37] We note that the Act itself expressly contemplates that requesting carriers will have access to network elements that are proprietary in nature. 47 U.S.C.A. § 251(d)(2)(A).

carriers to have direct access to the copyrights, patents, or trade secrets of these manufacturers. Presently, we do not have before us the specific unbundling duties contained in a particular negotiated agreement or a state arbitration decision that would be necessary to be able to determine if such infringements or takings were imminently likely to occur. Instead, we merely have the hypotheses of the intervenor and the petitioners, but "[a]ssertions of potential future injury do not satisfy the injury in fact test." *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994).

Moreover, to the extent that the petitioners seek to assert the rights of other copyright, patent, or trade secret owners, we do not believe that the circumstances of this case warrant an exception to the general rule that prevents "litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Oehrleins v. Hennepin County*, 1997 WL 304451, at *3 (8th Cir. June 9, 1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 509 (1975)). Before a litigant will be allowed to assert a claim on behalf of a third party, the litigant must show, among other things, that the third party is unable to protect its own interests. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991); *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1043 (8th Cir. 1992). The petitioners have not claimed, nor do we have reason to believe, that these third-party manufacturers of telecommunications technology are or will be unable to protect their intellectual property or constitutional rights. Thus, we conclude that the petitioners do not presently have standing to raise these claims.

4. The Unbundling Rules in Light of the Fifth Amendment's Takings Clause

The petitioners' final attack on the Commission's unbundling rules is their argument that the rules in general provide competing carriers with such extensive access and

use of the incumbent LECs' networks that they effect unconstitutional takings of the incumbent LECs' property. The petitioners then argue that we should reject the FCC's overly broad interpretation of the Act's unbundling duties in order to avoid such constitutional infirmities.

Once again, we note that we have already vacated several of the unbundling rules that constitute a significant portion of this particular complaint. Thus, we are skeptical that the remaining FCC unbundling rules will effect an actual taking. Nevertheless, because many of the ratemaking procedures have been held in abeyance in anticipation of our decision and given the fact that we have vacated many of the FCC's pricing rules in this opinion, we cannot, as of yet, determine whether the incumbent LECs are receiving or will receive just compensation for providing competing carriers with access to their networks. Therefore, we believe that this claim in not ripe for review. When a state or the federal government provides an adequate procedure for obtaining compensation, a takings claim is not ripe for review until the litigant has used the procedure and has been denied just compensation. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997). Under the Act, if an incumbent LEC and a requesting carrier fail to negotiate the rates for unbundled access on their own, a state commission will determine the amount of compensation that the requesting carrier must pay to the incumbent LEC for such access in an arbitration proceeding. *See* 47 U.S.C.A. § 252(c)(2). Because the petitioners have not demonstrated that they have participated in such state arbitration proceedings and have been denied just compensation, we find that their takings claim is not ripe for review. We note that such a claim could be presented to a federal district court under the review provisions of subsection 252(e)(6).

Having found that the takings claim on its merits is not ripe, there is no justification for withholding the traditional deference that we afford to reasonable agency interpretations of statutes. *See Chevron,* 467 U.S. at 844. Consequently, we stand by our earlier determinations upholding several of the Commission's unbundling rules in light of the Act's terms, and we also find that the Commission's rules and policies regarding the incumbent LECs' duty to provide for physical collocation of equipment to be consistent with the Act's terms contained in subsection 251 (c)(6). *See* 47 C.F.R. § 51.323(f); First Report and Order, ¶ 585 (requiring, among other things, incumbent LECs to take account of projected demand for collocation of equipment when planning renovations or new constructions).[38]

H. The Scope of Incumbent LECs' Resale Obligations-Rule 51.613

One petitioner objects to the FCC's determination that discounted and promotional offerings are "telecommunication service[s]" that are subject to the resale requirement of subsection 251(c)(4) and that promotional prices lasting more than 90 days qualify as "retail rates," subject to a wholesale discount. *See* 47 C.F.R. § 51.613(a)(2); First Report and Order, ¶¶ 948-50. The petitioner claims that the FCC's pronouncements violate the terms of the Act because subsection 251(c)(4) requires only "telecommunications service[s]" to be offered for resale, and the petitioner asserts that promotional and discount programs are not "telecommunications service[s]" but rather mere marketing tools. The petitioner also points out that the Act requires only telecommunications services that

[38] In sum, we uphold all of the Commission's unbundling regulations except for rules 51.305(a)(4), 51.311(c), 51.315(c)-(f), and 51.317, ¶¶ 278, 281 (only to the extent that these provisions create a presumption that a network element must be unbundled if it is technically feasible to do so); we vacate these listed provisions.

are offered at *retail rates* to be offered for resale and argues that by definition, promotional offerings are not offered at retail rates and thus should not be subject to the resale obligation. Finally, the petitioner contends that the FCC's determination that promotional prices that last more than 90 days qualify as "retail rates" but those that last 90 days or less are not "retail rates" is arbitrary and capricious and beyond the Commission's jurisdiction.

Despite the petitioner's arguments to the contrary, we believe that the FCC has jurisdiction to issue these particular rules and that its determinations are reasonable interpretations of the Act. Although we have already held that the Commission does not have jurisdiction to issue rules governing the specific rate determinations for the local competition provisions of the Act, which include the resale obligation under subsection 251(c)(4), we have recognized that subsection 251(c)(4)(B) authorizes the Commission to issue regulations regarding the incumbent LECs' duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services. *See supra* note 10 and accompanying text. While we vacated the Commission's pricing rules that dictated the specific methodology for state commissions to use in determining the actual wholesale rates, *see* 47 C.F.R. §§ 51.601-51.611, the FCC's determination in section 51.613 merely defines the overall scope of the incumbent LECs' resale obligation by indicating that telecommunications services offered at special promotional rates that last for more than 90 days will be subject to resale at a wholesale discount. This rule is a valid exercise of the Commission's authority under subsection 251(c)(4)(B) because it restricts the ability of incumbent LECs to circumvent their resale obligations under the Act simply by offering their services to their subscribers at perpetual "promotional" rates. Moreover, the Commission's determination that promotional rates that are effective for more than 90 days qualify as "retail rates" is a reasonable interpretation of the

Act's terms and was not made arbitrarily or capriciously. The Commission evaluated the option of drawing the line at 120 days but rationally decided that "excluding promotions that are offered for as long as four months may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale." First Report and Order, ¶ 950. Additionally, the Commission's inclusion of promotional rates that endure beyond 90 days in the category of "retail rates" deserves our deference, because the Act does not define the term "retail rates." *See Chevron*, 467 U.S. at 843-44 (requiring controlling weight to be given to agency regulations that fill gaps left by Congress). Finally, we find that the petitioner's argument that promotional programs are not "telecommunications service[s]" but rather marketing tools misses the point. The fact remains that the subject matters underlying the promotional programs and the promotional rates are telecommunications services which the FCC reasonably concluded must be made available for resale. We thus uphold section 51.613 as a valid regulation.

III. Conclusion

We decline the petitioners' request to vacate the FCC's entire First Report and Order and limit our rejection of FCC rules only to those that we have specifically overturned in this opinion.[39] We believe that the provisions of the Commission's First Report and Order are severable

[39] In total, we vacate the following provisions; 47 C.F.R. §§ 51.303, 51.305(a)(4), 51.311(c), 51.315(c)-(f), 51.317 (vacated only to the extent this rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so), 51.405, 51.501-51.515 (inclusive, except for 51.515(b)), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive, except for 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717, but only as they apply to CMRS providers), 51.809; First Report and Order, ¶¶ 101-103, 121-128, 180. We also vacate the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, date September 27, 1996.

and that the Commission intended them to be so. *See Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (severability depends on issuing agency's intent).

As an aside, and while we do not pretend to possess the Rosetta stone that reveals the true meaning of every portion of this Act, we hope that our review of the FCC's First Report and Order in light of the Act's provisions offers some guidance to the participants in the telecommunications industry as they continue its evolution into the competitive marketplace Congress intended.

Upon the filing of this opinion and order, the provisions of our stay order are deemed expired.

The pending motion of the intervenors in support of the FCC to strike a claim allegedly raised for the first time in the reply brief of the Regional Bell Companies and GTE or, in the alternative, for leave to file a surreply is denied as moot because we did not adopt the argument advanced.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-3321/3406/3410/3414/3416/3418/3424
96-3430/3436/3444/3450/3453/3460/3507
96-3519/3520/3603/3604/3608/3696/3708
96-3709/3756/3901/3906/3982

IOWA UTILITIES BOARD, *et al*,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order of the
Federal Communications Commission

Petitioners' motions for immediate issuance of the mandate are granted, and the clerk of the court is directed to issue the court's mandate forthwith.

The motions to enforce the court's mandate are being treated separately from the motions to issue the mandate. The motions to enforce the mandate remain under active consideration and disposition.

October 14, 1997

Order entered at the direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-3321/3406/3410/3414/3416/3418/3424
96-3430/3436/3444/3450/3453/3460/3507
96-3519/3520/3603/3604/3608/3696/3708
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IOWA UTILITIES BOARD, *et al*,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order of the
Federal Communications Commission

Filed: October 14, 1997

Before BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

Order on Petitions for Rehearing
(as amended on October 23, 1997)

1. The petitions for rehearing filed by AT&T Corporation, MCI Telecommunications Corporation, America's Carriers Telecommunications Association, Cable & Wireless, WorldCom, Inc., Competitive Telecommunications Association, Sprint Corporation, Telecommunications Re-

sellers Association, Frontier Corporation, Competition Policy Institute, Association for Local Telecommunication Services, Winstar Communications, Inc., Nextlink Communications, LLC, US One Communications, ICG Telecom Group, Inc., ACSI, and the National Cable Television Association, Inc. are denied. The petitions for rehearing filed by GTE Entities, SBC Communications Inc., BellSouth Corporation, US WEST, Inc., Bell Atlantic Corporation, the Mid-Sized LECs, and Ameritech Corporation are granted.

2. Upon rehearing the Court strikes Part II(G)(1)(f) of the opinion issued July 18, 1997, reported at 120 F.3d 753, 813 (8th Cir. 1997), and substitutes in lieu thereof the following Part II(G)(1)(f):

"f. Combination of Network Elements

We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on an unbundled basis, 47 C.F.R. § 51.315 (c)-(f), cannot be squared with the terms of subsection 251(c)(3). The last sentence of subsection 251(c)(3) reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." 47 U.S.C.A. § 251(c)(3) (emphasis added). This sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements. The FCC and its supporting intervenors argue that because the incumbent LECs maintain control over their networks it is necessary

to force them to combine the network elements, and they believe that the incumbent LECs would prefer to do the combining themselves to prevent the competing carriers from interfering with their networks. Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do *all* of the work. Moreover, the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them.

Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

Consequently, we vacate rule 51.315(b)-(f) as well as the affiliated discussion sections."

3. Footnotes 38 and 39 of the opinion filed July 18, 1997, are amended as follows: The citations to rule 51.315(c)-(f) are amended to read "51.315(b)-(f)."

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-3519

THE PEOPLE OF THE STATE OF CALIFORNIA; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

BELL ATLANTIC CORPORATION; BELLSOUTH CORPORATION; PACIFIC TELESIS GROUP; SBC COMMUNICATIONS, INC.; MARYLAND PUBLIC SERVICE COMMISSION; US WEST, INC.; US TELEPHONE ASSOCIATION; ARKANSAS PUBLIC SERVICE COMMISSION; ALLTEL TELEPHONE SERVICES CORPORATION; AMERITECT CORPORATION; OREGON PUBLIC UTILITY COMMISSION; NORTH STATE TELEPHONE COMPANY; WESTERN ALLIANCE; INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE; ROSEVILLE TELEPHONE COMPANY; CONCORD TELEPHONE COMPANY; ROCK HILL TELEPHONE COMPANY; PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; AMERICAN PUBLIC COMMUNICATIONS COUNCIL, INC.; ICG TELECOM GROUP, INC.; MINNESOTA PUBLIC UTILITIES COMMISSION; SOUTHERN NEW ENGLAND TELEPHONE COMPANY; THE AD HOC COALITION OF TELECOMMUNICATIONS MANUFACTURING COMPANIES; PACIFIC TELECOM, INC.; MINNESOTA INDEPENDENT COALITION; KENTUCKY PUBLIC SERVICE COMMISSION; KANSAS CORPORATION COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF WYOMING; RHODE ISLAND PUBLIC UTILITIES COMMISSION; PUBLIC SERVICE COMMISSION OF WISCONSIN; STATE OF TEXAS;

ALABAMA PUBLIC SERVICE COMMISSION; CITIZENS TELEPHONE COMPANY OF KECKSBURG; NEW MEXICO STATE CORPORATION COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA; GTE SERVICE CORPORATION; UTAH DEPARTMENT OF COMMERCE, DIVISION OF PUBLIC UTILITIES; PUBLIC SERVICE COMMISSION OF UTAH; PUBLIC SERVICE COMMISSION OF THE STATE OF SOUTH CAROLINA; TENNESSEE REGULATORY AUTHORITY; AGING FORUM, INC., DOING BUSINESS AS NATIONAL SILVER HAIRED CONGRESS; U.S. COALITION ON AGING; COLLEGE FOR LIVING; COUNCIL OF SILVER HAIRED LEGISLATURES; MISSOURI ALLIANCE OF AREA AGENCIES ON AGING; MISSOURI ASSOCIATION FOR THE DEAF; MISSOURI COUNCIL OF THE BLIND; PRESIDENTS' CLUB FOR TELECOMMUNICATIONS JUSTICE; PARAQUAD, RURAL ADVOCATES FOR INDEPENDENT LIVING; SERVICES FOR INDEPENDENT LIVING; PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS; OKLAHOMA CORPORATION COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC UTILITY CONTROL; NEW YORK TELEPHONE COMPANY; NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Intervenors on Appeal,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents,

AT&T CORP.; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION; MFS COMMUNICATIONS COMPANY, INC.; AIRTOUCH COMMUNICATIONS, INC.; NEXTLINK COMMUNICATIONS, L.L.C.; SPRINT SPECTRUM, L.P.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; MCI TELECOM-

MUNICATIONS CORPORATION; SPRINT CORP.; COX COMMUNICATIONS, INC.; VANGUARD CELLULAR SYSTEMS, INC.; WESTERN WIRELESS CORPORATION; AMERICAN COMMUNICATIONS SERVICES, INC.; KMC TELECOM, INC.; THE COMPETITION POLICY INSTITUTE; ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES; CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION; GST TELECOM, INC.; ACC CORP.; GENERAL COMMUNICATION, INC.; TELECOMMUNICATION RESELLERS ASSOCIATION; CONSUMER FEDERATION OF AMERICA; AD HOC TELECOMMUNICATIONS USERS COMMITTEE; INFORMATION TECHNOLOGY INDUSTRY COUNCIL; AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION; JONES INTERCABLE, INC.; TELECOMMUNICATIONS, INC.; TELEPORT COMMUNICATIONS GROUP, INC.; RURAL TELECOMMUNICATIONS GROUP; ALLIED ASSOCIATED PARTNERS; GELD INFORMATION SYSTEMS; PRONET, INC.; WINSTAR COMMUNICATIONS, INC.; U.S. ONE COMMUNICATIONS SERVICES; COMCAST CORPORATION; FRONTIER CORPORATION; ANAHEIM, CALIFORNIA PUBLIC UTILITIES DEPARTMENT; CITY OF LONG BEACH, CALIFORNIA; CITY OF MANASSAS, VIRGINIA; CABLE & WIRELESS, INC.; NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES; TIME WARNER COMMUNICATIONS HOLDINGS, INC.; PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION; EXCEL TELECOMMUNICATIONS, INC.; WORLDCOM, INC., PAGING NETWORK, INC.; NEXTWAVE TELECOM, INC.; SMALL CABLE BUSINESS ASSOCIATION; METROCALL, INC.; TEXAS OFFICE OF PUBLIC UTILITY COUNSEL,

Intervenors on Appeal,

CONSUMERS' UTILITY COUNSEL DIVISION, GEORGIA GOVERNOR'S OFFICE OF CONSUMER AFFAIRS; HONORABLE JOHN D. DINGELL; HONORABLE W.J. (BILLY) TAUZIN;

HONORABLE RICK BOUCHER; HONORABLE DENNIS HASTERT,
Amici on Behalf of Petitioner,

HONORABLE THOMAS J. BLILEY, JR.; HONORABLE ERNEST F. HOLLINGS; HONORABLE TED STEVENS; HONORABLE DANIEL K. INOUYE; HONORABLE TRENT LOTT; HONORABLE EDWARD J. MARKEY,
Amici on Behalf of Respondent.

No. 96-4080

BELL ATLANTIC-DELAWARE, INC.; BELL ATLANTIC-MARYLAND, INC.; BELL ATLANTIC-NEW JERSEY, INC.; BELL ATLANTIC-PENNSYLVANIA, INC.; BELL ATLANTIC-VIRGINIA, INC.; BELL ATLANTIC-WASHINGTON, D.C., INC.; BELL ATLANTIC-WEST VIRGINIA, INC.,
Petitioners,

MARYLAND PUBLIC SERVICE COMMISSION; SBC COMMUNICATIONS, INC.; NEW YORK TELEPHONE COMPANY; NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY; US TELEPHONE ASSOCIATION; GTE SERVICE CORPORATION; US WEST, INC.; BELLSOUTH CORPORATION; BELLSOUTH TELECOMMUNICATIONS, INC.; AMERITECT CORPORATION,
Intervenors on Appeal,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents,

SPRINT CORP.; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION; TELECOMMUNICATIONS RESELLERS ASSOCIATION; AT&T CORP.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; GST TELECOM, INC.; MFS COMMUNICATIONS COMPANY, INC.; KMC TELECOM, INC.; ACC CORP.; WINSTAR COMMUNICATIONS, INC.; MCI TELECOMMUNICATIONS CORPORATION; AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION; JONES COMMUNICATIONS, INC.; AIRTOUCH COMMUNICATIONS, INC.; COX COMMUNICATIONS, INC.,
Intervenors on Appeal.

No. 96-4082

PACIFIC TELESIS GROUP,
Petitioner,

MARYLAND PUBLIC SERVICE COMMISSION; SBC COMMUNICATIONS, INC.; NEW YORK TELEPHONE COMPANY; NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY; US TELEPHONE ASSOCIATION; GTE SERVICE CORPORATION; US WEST, INC.; BELLSOUTH CORPORATION; BELLSOUTH TELECOMMUNICATIONS, INC.; AMERITECH CORPORATION,
Intervenors on Appeal,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents,

SPRINT CORP.; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION; TELECOMMUNICATIONS RESELLERS ASSOCIATION; AT&T CORP.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; GST TELECOM, INC.; MFS COMMUNICATIONS COMPANY, INC.; KMC TELECOM, INC.; ACC CORP.; WINSTAR COMMUNICATIONS, INC.; MCI

TELECOMMUNICATIONS CORPORATION; AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION; JONES COMMUNICATIONS, INC.; AIRTOUCH COMMUNICATIONS, INC.; COX COMMUNICATIONS, INC.,
Intervenors on Appeal.

No. 96-4083

SBC COMMUNICATIONS, INC.,
Petitioner,

MARYLAND PUBLIC SERVICE COMMISSION; NEW YORK TELEPHONE COMPANY; NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY; US TELEPHONE ASSOCIATION; GTE SPRVICE CORPORATION; *US* WEST, INC.; BELLSOUTH CORPORATION; BELLSOUTH TELECOMMUNICATIONS, INC.; AMERITECH CORPORATION,
Intervenors on Appeal,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents,

SPRINT CORP.; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION; TELECOMMUNICATIONS RESELLERS ASSOCIATION; AT&T CORP.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; GST TELECOM, INC.; MFS COMMUNICATIONS COMPANY, INC.; KMC TELECOM, INC.; ACC CORP.; WINSTAR COMMUNICATIONS, INC.; MCI TELECOMMUNICATIONS CORPORATION; AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION; JONES COMMUNICATIONS, INC.; AIRTOUCH COMMUNICATIONS, INC.; COX COMMUNICATIONS, INC.,
Intervenors on Appeal.

On Petitions for Review of an Order of the
Federal Communications Commission

Submitted: April 16, 1997

Filed: August 22, 1997

Before BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Before us are the petitions of the California Public Utilities Commission and various providers of local telecommunications services seeking review of certain rules issued by the Federal Communications Commission (FCC or Commission) pursuant to the Telecommunications Act of 1996.[1] The petitioners and the intervenors supporting them (collectively "petitioners") argue that the FCC exceeded its jurisdiction in part in issuing dialing parity rules that encompass some purely intrastate telecommunications services, and they assert that one of the Commission's rules on numbering administration violates the terms of the Act. Consistent with our decision in the related case, *Iowa Utils. Bd. v. FCC*, No. 96-3321 and consolidated cases, 1997 WL 403401 (8th Cir. July 18, 1997), we vacate the FCC's dialing parity rules in part, concluding that the FCC exceeded the scope of its jurisdiction. We find that the petitioners' challenge to the FCC's numbering administration rule, however, is not ripe for review.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, United States Code).

I.

One of Congress's goals in passing the Telecommunications Act of 1996 was to open the local telephone markets to competition. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56 (1996). To accomplish this objective, the Act imposes several duties on the current providers of local telecommunications service (known as "incumbent local exchange carriers" or "incumbent LECs") including the duties to provide competing carriers with interconnection and unbundled access to the incumbents LECs' networks and to allow competing carriers to resell any telecommunications service that the incumbent LECs provide to their subscribers on a retail basis. 47 U.S.C.A. § 251(c)(2)-(4) (West Supp. 1997).[2] The FCC issued numerous rules in its First Report and Order[3] purporting to implement these as well as other provisions of the Act. In our earlier decision in *Iowa Utils. Bd.*, we reviewed many of the Commission's regulations contained in its First Report and Order and held, in part, that the FCC exceeded its authority in promulgating rules governing the prices that incumbent LECs may charge competing carriers for interconnection, unbundled access, and resale of services. *See Iowa Utils. Bd.* 1997 WL 403401, at *9.

In the present case, the petitioners challenge several portions of the Commission's Second Report and Order,[4] which contains additional FCC comments and regulations

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[2] All references in this opinion to sections and subsections of the Telecommunications Act of 1996 in West's United States Code Annotated (U.S.C.A.) are to the 1997 supplement.

[3] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996).

[4] Second Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996) [hereinafter Second Report and Order].

regarding provisions of the Telecommunications Act of 1996 that were not addressed in the First Report and Order. In particular, the petitioners challenge the FCC's rules implementing the Act's requirement that all local exchange carriers provide dialing parity to competing providers of local and long-distance service. *See* 47 U.S.C.A. § 251(b)(3) (statutory dialing parity requirement); 47 C.F.R. §§ 51.205-51.215 (1996) (FCC dialing parity rules). Additionally, the petitioners challenge the FCC's rule, 47 C.F.R. § 52.17, implementing the Act's mandate that the costs of creating telecommunications numbering administration arrangements be shared by all telecommunications carriers on a competitively neutral basis. *See* 47 U.S.C.A. § 251(e)(2) (statutory numbering administration requirement).

II.

We have jurisdiction to review final orders of the FCC pursuant to 28 U.S.C. § 2342(1) (1994) and 47 U.S.C. § 402(a) (1994). Courts of appeals may set aside agency rules that (1) conflict with the plain meaning of a statute, (2) are unreasonable interpretations of ambiguous statutes, or (3) are the product of arbitrary or capricious action by the agency. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

A. Dialing Parity Rules

The petitioners argue that the FCC exceeded its jurisdiction in promulgating its dialing parity rules, 47 C.F.R. §§ 51.205-51.215. Dialing parity is a technological capability that enables a telephone customer to route a call over the network of the customer's preselected carrier without having to dial an access code of extra digits. *See* 47 U.S.C.A. § 153(15). The petitioners claim that the FCC did not have authority to issue these dialing parity rules to the extent that the rules involve intraLATA tele-

communications. The petitioners rely heavily on section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b) (1994), to support their jurisdictional attack on the FCC's dialing parity rules. Section 2(b) provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service. *Id.* The petitioners assert that even though the Commission's dialing parity rules are not phrased explicitly in terms of "intrastate" or "interstate," but rather use the terms "intraLATA," "interLATA," "local," and "toll" to describe the telecommunications they regulate, 47 C.F.R. §§ 51.205-51.215, the intraLATA aspects of the rules overwhelmingly pertain to intrastate communications service and are thus beyond the scope of the FCC's authority. Given the importance of the terminology in this case, we find it necessary initially to explain our understanding of the "LATA" concept and the difference between "local" and "toll" calls.

The acronym "LATA" stands for "local access and transport area," 47 U.S.C.A. § 153(25), and was initially adopted by the district court administering the 1982 consent decree that broke up AT&T. *See United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983). The consent decree divided the former Bell territory into geographic units known as "LATAs." *Id.* The 1982 consent decree limited LECs' transportation of telecommunications to traffic between points within a LATA, i.e., "intraLATA" traffic, while traffic between telephones located in two different LATAs, i.e. "interLATA" traffic, was allotted to long-distance carriers such as AT&T, MCI, and Sprint. The boundaries of LATAs generally center around cities or other identifiable communities of interest; in some instances, one LATA encompasses an entire state. The United States is currently divided into 192 LATAs, and for the most part, LATAs do not cross state lines.

(*See* Joint Br. of Intervenors in Support of the FCC at 9.) We are told that approximately 98% of all intraLATA calls are intrastate in nature. (Bell Atlantic Br. at 14.)

IntraLATA calls can be either "local" or "toll" calls, but interLATA calls are exclusively "toll" calls. Calls that remain within a caller's immediate local calling area (a smaller geographic area within a LATA) are intraLATA local calls and are currently made without incurring any additional charge beyond the flat monthly rate that one pays for local phone service. Calls that are completed outside of a caller's local calling area are "toll" calls and a separate charge or "toll" is incurred for making these calls. *See* 47 U.S.C.A. § 153(48). A single LATA can and frequently does encompass more than one immediate local calling area. Thus "intraLATA" is not synonymous with "local." A call that is completed outside of the caller's immediate local calling area but within the same LATA is an intraLATA toll call, while a call that is completed outside of both the caller's immediate local calling area and his or her LATA is an interLATA toll call.

The FCC argues that because the rules refer to "LATAs" and because "LATAs" do not necessarily correspond to state boundaries, section 2(b), which removes intrastate communication services from the FCC's reach, is not relevant to the issue of the Commission's authority over dialing parity. Contrary to the FCC's assertion, however, the different nomenclature used in the FCC's dialing parity rules neither renders section 2(b) irrelevant nor weakens its effect with respect to this jurisdictional issue. The fact remains that approximately 98% of all intraLATA calls (local or toll) are intrastate in nature. The FCC itself has acknowledged that the vast majority of intraLATA calls are intrastate and not within its jurisdiction. *See Notice of Proposed Rulemaking, In the Matter of Administration of the North American Numbering*

Plan, 9 FCC Rcd 2068, 2077 n.93 (1994). More importantly, we believe that section 2(b) preserves intrastate communications for state regulation regardless of what other labels may be applied to these communications. Although section 2(b) does not apply to the portion of intraLATA calls that are interstate in nature, it does apply to the portion of intraLATA calls that are intrastate in nature. Consequently, section 2(b) remains an obstacle that the FCC must overcome in order to save its intraLATA dialing parity rules from the petitioners' jurisdictional attack.

In *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 377 (1986), the Supreme Court explained that section 2(b) "fences off" intrastate telecommunications matters from FCC regulation and indicated that the 2(b) fence could be hurdled only by an unambiguous congressional grant of intrastate authority to the FCC or an express amendment to section 2(b) itself. The Court further stated that section 2(b) also operates as a rule of statutory construction requiring that nothing in the Act, which includes the 1996 amendments, be construed to provide the FCC with jurisdiction over intrastate telecommunications service. *Id.* at 376-77 n.5. The FCC and its supporting intervenors initially contend that merely the federal Act's application to intrastate telecommunications matters is sufficient to supply the Commission with the authority to regulate such matters, even in light of section 2(b). The Commission argues that it has plenary authority to implement all of the requirements of federal telecommunications statutes and that section 2(b) restricts only the Commission's ancillary authority. We previously rejected the same argument in *Iowa Utils. Bd.*, 1997 WL 403401, at *7, and now, we do so again for the same reasons. Our reading of *Louisiana* indicates that a federal act must expressly apply to intrastate telecommunications matters *and* explicitly direct the FCC to implement the act's intrastate requirements before the Commission will

have jurisdiction over intrastate telecommunications matters. While subsection 251(b)(3) does require dialing parity at the intrastate level, it makes no reference whatsoever to the FCC. *See* 47 U.S.C.A. § 251(b)(3). Without a clear grant of intrastate authority to the FCC, section 2(b) stands as a fortification against the Commission's intrusion into telecommunications matters that are intrastate in character.

Alternatively, the FCC argues that several statutory provisions supply the Agency with sufficiently straightforward grants of broad intrastate authority to enable the Agency to overcome section 2(b)'s limitation. The Commission claims that subsection 251(d)(1) directly grants the Agency authority to implement all of the requirements in section 251, including the dialing parity provision in subsection 251(b)(3). Subsection 251(d)(1) reads, "Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C.A. § 251(d)(1). As we found in *Iowa Utils. Bd.*, 1997 WL 403401, at *4, this subsection is merely a time limit on the Commission, directing it to complete expeditiously its rulemaking related to those portions of section 251 that expressly call for the Commission's involvement. This provision does not authorize the FCC to issue intraLATA dialing parity rules, because the subsection addressing dialing parity, § 251(b)(3), does not mention the FCC. We also reject the FCC's argument that its general rulemaking authority contained in subsections 201(b), 154(i), and 303(r) of the Communications Act is a legitimate source of jurisdiction for the Commission's intraLATA dialing parity rules. The FCC's jurisdiction under section 201 is specifically limited to interstate or foreign communications services. *See* 47 U.S.C. § 201(a). Meanwhile, subsections 154(i) and 303(r) merely provide the FCC with ancillary authority to promulgate additional regulations that might be required in order for the Com-

mission to meet its principal obligations contained in other provisions of the statute. *See id.* §§ 154(i), 303(r); *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990). Neither 154(i) nor 303(r) supplies the FCC with additional substantive authority sufficient to overcome section 2(b).

The group of intervenors supporting the FCC argues that section 160 of the Act, 47 U.S.C.A. § 160, implies that the Commission has authority to issue regulations pursuant to the entire Act because this section allows the Commission to forbear from applying regulations or provisions of the Act. They reason that the power to forbear from regulating necessarily presumes the power to regulate in the first place. While this section does provide the Commission with the power to forbear from applying provisions of the Act, we believe that this power is limited to forbearing from applying those provisions that pertain to interstate telecommunications or the portions of the Act addressing intrastate telecommunications that also specifically call for the FCC's involvement such as subsection 251(b)(2) (number portability) or subsection 251(c)(4)(B) (prevention of discriminatory conditions on resale). Section 160's general authorization allowing the FCC to forbear from applying provisions of the Act is not the type of straightforward and unambiguous grant of intrastate authority that lifts the FCC over the section 2(b) fence. When Congress intends to vest the FCC with intrastate authority, it is well aware of how to draft a statute that overcomes section 2(b). In the Telecommunications Act itself, one provision explicitly directs the *FCC* to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed *intrastate* and interstate call using their payphone. . . ." 47 U.S.C.A. § 276(b)(1)(A) (emphasis added). Neither section 160 nor any other provision in the Act supplies the FCC with such an explicit grant of intrastate authority over dialing parity. As

we have stated, subsection 251(b)(3), the provision directly addressing dialing parity, makes no reference to the FCC, in stark contrast to several other subsections of the very same section of the Act, such as subsection 251(b)(2) (number portability) and subsection 251(e) (numbering administration), that expressly call for the FCC's participation in implementing their requirements. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). We believe the argument is even stronger when different subsections of the same section demonstrate the difference. We conclude that the Act's different treatment of dialing parity signifies Congress's intent to leave regulation of this matter to the states. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2064 (1997) (finding that "a different intent explains the different treatment" of two provisions in the Antiterrorism and Effective Death Penalty Act of 1996).

The FCC's last hope of justifying its intraLATA dialing parity rules rests with subsection 251(g). Although not expressly addressing dialing parity, subsection 251(g) preserves all of the equal access obligations [8] and interconnection restrictions that existed prior to February 8, 1996 "under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996." *Id.* § 251(g). This subsection also provides that such obligations and restrictions are enforceable as regulations of the Commission. The FCC contends that the

[8] Dialing parity is considered to be a type of "equal access obligation." (*See* Joint Br. of Intervenors in Support of the FCC at 23-24.)

1982 consent decree that broke up the former Bell monopoly contained intraLATA dialing parity requirements, in addition to interLATA ones, that the FCC is now authorized to supersede under subsection 251(g). While the court administering the consent decree did discuss matters related to intraLATA dialing parity and attempted to provide LECs with an incentive to allow intraLATA toll competition, *see Western Elec. Co.*, 569 F. Supp. at 1006; *United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1108-09 (D.D.C.), *aff'd by California v. United States*, 464 U.S. 1013 (1983), the consent decree's provisions involving dialing parity pertained only to interLATA calls; the decree did not provide any specific intraLATA dialing parity rules. *See United States v. Western Elec. Co.*, 552 F. Supp. 131, 233 (D.D.C. 1982). In fact, the district court expressly stated that "intrastate as well as intraLATA regulation is not preempted by the decree and, hence, that state regulatory bodies will control traffic within the LATAs themselves." 569 F. Supp. at 1005; *see also, Western Elec. Co.*, 569 F. Supp. at 1109 (explaining that a proposed intraLATA dialing parity rule to be included in the consent decree "would inappropriately override state regulators' authority to decide what intrastate calling arrangements are best suited to the public interest within their states."). Moreover, the FCC itself concedes that subsection 251(g) "contains no reference or cross reference to dialing parity or to section 251(b)(3)" and merely preserves the dialing parity requirements already imposed on incumbent LECs. Second Report and Order, ¶ 29. Consequently, subsection 251(g) does not authorize the FCC to issue dialing parity rules governing intraLATA telecommunications.

Finally, the petitioners point out that subsection 271 (e)(2)(B) indicates that state commissions, not the FCC, have the authority to issue intraLATA dialing parity rules. In limiting a state's ability to require a Bell operating company to implement intraLATA toll dialing parity until the

Bell company has received the authority to provide interLATA services, this provision implies that jurisdiction to regulate intraLATA dialing parity rests with the states. *See* 47 U.S.C.A. § 271(e)(2)(B). The FCC maintains that this subsection merely reveals that the states and the Commission have parallel jurisdiction over dialing parity. As we have demonstrated above, however, section 2(b) fences off the intrastate aspects of intraLATA dialing parity from the FCC, thus refuting the Commission's theory of parallel jurisdiction. Consequently, we conclude that the FCC exceeded its jurisdiction in promulgating its dialing parity rules, 47 C.F.R. §§ 51.205-51.215 (inclusive), but we set aside such rules only to the extent that they pertain to intraLATA telecommunications traffic.[6]

B. Numbering Administration Rule

The petitioners also challenge the FCC's method for recouping the costs of establishing numbering administration arrangements. Numbering administration involves the coordination and distribution of all telephone numbers in the United States. In particular, the incumbent LECs target the Commission's provision that allows carriers to deduct the amounts they pay to other carriers for telecommunications services and facilities from their gross reve-

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[6] Because section 2(b) prevents the FCC from having jurisdiction only over intra*state* telecommunications matters, our decision to vacate the FCC's dialing parity rules does not apply to the extent that the Commission's rules govern the very small percentage of intraLATA, toll, interstate telecommunications. Our vacation order does include, however, the rules' application to the even smaller percentage of intraLATA, *local*, interstate calls, despite their interstate nature. *See* 47 U.S.C. § 221(b); *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1331 n.5 (D.C. Cir. 1989); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977). Because the petitioners limited their challenges to the intraLATA aspects of the FCC's dialing parity rules, we make no determination regarding the validity of the FCC's dialing parity rules as they apply to interLATA telecommunications.

nues in calculating a carrier's portion of the costs involved in administering a numbering administration program. *See* 47 C.F.R. § 52.17(b). The petitioners contend that this rule violates the Act's requirement that numbering administration costs "be borne by all telecommunications carriers on a competitively neutral basis." 47 U.S.C.A. § 251(e)(2). The petitioners claim that if state commissions [7] do not allow incumbent LECs to include their numbering administration costs in the prices they charge to their competitors for telecommunications services and facilities, the deduction will afford the incoming competitors a cost advantage and result in a noncompetitively neutral cost allocation method. On the other hand, the parties appear to agree that if such costs are included in the prices that incumbent LECs are permitted to charge to their competitors, then the FCC's numbering administration rule would be valid.

Article III of the Constitution limits our jurisdiction to deciding actual cases or controversies that are ripe for review.

> The basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

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[7] We recently held that state commissions have the authority to establish the prices that incumbent LECs may charge their competitors for interconnection, unbundled access, resale of services, and transport and termination of telecommunications traffic. *Iowa Utils. Bd.*, 1997 WL 403401, at *9. Accordingly, the question of whether or not incumbent LECs will be permitted to include numbering administration costs in those prices will be decided by the state commissions.

State of Missouri v. Cuffley, 112 F.3d 1332, 1337 (8th Cir. 1997) (internal quotations and citations omitted). Because the validity of this rule depends on the state commissions' determinations of the rates that incumbent LECs will be able to charge their competing carriers for interconnection, unbundled access, and other telecommunications services and facilities, and none of those determinations is before us in this proceeding, we find that the alleged harm to the petitioners is speculative at this juncture and conclude that this issue is not ripe for review.

III.

In sum, we vacate the FCC's dialing parity rules, 47 C.F.R. §§ 51.205-51.215, but only to the extent that they apply to intraLATA telecommunications and subject to the conditions noted above, *see supra* note 6 and accompanying text, and we find the Commission's numbering administration rule, 47 C.F.R. § 52.17, not ripe for review.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

The following is a list of involved parties not already mentioned in Appendix A:

Aliant Communications Co.;
Cincinnati Bell Telephone Company;
Contel of California, Inc.;
Contel of Minnesota, Inc.;
Contel of the South, Inc.;
Dakota Public Utilities Commission;
Florida Public Service Commission;
GTE Alaska, Incorporated;
GTE Arkansas, Incorporated;
GTE California Incorporated;
GTE Florida, Incorporated;
GTE Midwest, Incorporated;
GTE South, Incorporated;
GTE Southwest, Incorporated;
GTE North, Incorporated;
GTE Northwest, Incorporated;
GTE Hawaiian Telephone Company, Incorporated;
GTE West Coast, Incorporated;
Georgia Public Service Commission;
Louisiana Public Service Commission;
Mississippi Public Service Commission;
Missouri Public Service Commission;
National Association of Regulatory Utility Commissioners;
North Carolina Utilities Commission;
Pennsylvania Public Utility Commission;
The People of the State of California;
People of the State of New York;
The Public Service Commission of the State of New York;
The Public Utilities Commission of the State of California;
Rural Telephone Coalition;
The Southern New England Telephone Company;
United States Telephone Association;
Virginia State Corporation Commission.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

FROM TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purposes of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

§ 152. Application of chapter

(a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of en-

ergy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in [the Philippine Islands or] the Canal Zone, or to wire or radio communication or transmission wholly within [the Philippine Islands or] the Canal Zone. The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.

(b) Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and Title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

§ 154. Federal Communications Commission

(i) Duties and powers. The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility. Notwithstanding section 332 (c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed. In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be

the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance. Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation. Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after Commission forbearance. A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connec-

tions with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to

this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to the date of enactment of this subsection, issue an order concluding the investigation not later than 12 months after such date of enactment.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a).

§ 251. Interconnection

(a) General duty of telecommunications carriers. Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) Obligations of all local exchange carriers. Each local exchange carrier has the following duties:

(1) Resale. The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability. The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity. The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way. The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 the particular terms

and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale. The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes. The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation.

(1) In general. Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration.

(1) Commission authority and jurisdiction. The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs. The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications.

(1) Exemption for certain rural telephone companies.

(A) Exemption. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule. The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption. The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any

telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) Suspensions and modifications for rural carriers. A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements. On and after the date of enactment of the Telecommunications Act of 1996, each

local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier.

(1) Definltion. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents. The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision. Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any re-

sponse thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251 (b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission.

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection. The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) any agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5),

the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements of generally available terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) Consolidation of State proceedings. Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing required. A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier. For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

§ 253. Removal of barriers to entry

(a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers. Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers.

(f) Rural Markets. It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or ex-

change access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and

(2) to a provider of commercial mobile services.

§ 254. Universal service

(a) Procedures to review universal service requirements.

(1) Federal-State Joint Board on Universal Service. Within one month after the date of enactment of the Telecommunications Act of 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c), one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after the date of enactment of the Telecommunications Act of 1996.

(2) Commission action. The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after the date

of enactment of the Telecommunications Act of 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles. The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates. Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services. Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas. Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions. All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms. There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries. Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional principles. Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

(c) Definition.

(1) In general. Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications. The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services. In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

(d) Telecommunications carrier contribution. Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support. After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority. A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preserva-

tion and advancement of universal services in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services. Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers.

(1) In general.

(A) Health care providers for rural areas. A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in compara-

ble rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries. All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall—

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services. The Commission shall establish competitively neutral rules—

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions. Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users. No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (5)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act.

(5) Definitions. For purposes of this subsection:

(A) Elementary and secondary schools. The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

(B) Health care provider. The term "health care provider" means—

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics; and

(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) Public institutional telecommunications user. The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(i) Consumer protection. The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance. Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited. A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

§ 255. Access by persons with disabilities

(a) Definitions. As used in this section—

(1) Disability. The term "disability" has the meaning given to it by section 3(2)(A) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)(A)).

(2) Readily achievable. The term "readily achievable" has the meaning given to it by section 301(9) of that Act (42 U.S.C. 12181(9)).

(b) Manufacturing. A manufacturer of telecommunications equipment or customer premises equipment shall

ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.

(c) Telecommunications services. A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.

(d) Compatibility. Whenever the requirements of subsections (b) and (c) are not readily achievable, such a manufacturer or provider shall ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

(e) Guidelines. Within 18 months after the date of enactment of the Telecommunications Act of 1996, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission. The Board shall review and update the guidelines periodically.

(f) No additional private rights authorized. Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

§ 256. Coordination for interconnectivity

(a) Purpose. It is the purpose of this section—

(1) to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service through—

(A) coordinated public telecommunications network planning and design by telecommunications carriers and other providers of telecommunications service; and

(B) public telecommunications network interconnectivity, and interconnectivity of devices with such networks used to provide telecommunications service; and

(2) to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.

(b) Commission functions. In carrying out the purposes of this section, the Commission—

(1) shall establish procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service; and

(2) may participate, in a manner consistent with its authority and practice prior to the date of enactment of this section, in the development by appropriate industry standards-setting organizations of public telecommunications network interconnectivity standards that promote access to —

(A) public telecommunications networks used to provide telecommunications service;

(B) network capabilities and services by individuals with disabilities; and

(C) information services by subscribers of rural telephone companies.

(c) Commission's authority. Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before

the date of enactment of the Telecommunications Act of 1996.

(d) Definition. As used in this section, the term "public telecommunications network interconnectivity" means the ability of two or more public telecommunications networks used to provide telecommunications service to communicate and exchange information without degeneration, and to interact in concert with one another.

§ 257. Market entry barriers proceeding

(a) Elimination of barriers. Within 15 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other shall businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

(b) National policy. In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

(c) Periodic review. Every 3 years following the completion of the proceeding required by subsection (a), the Commission shall review and report to Congress on—

(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) and that can be prescribed consistent with the public interest, convenience, and necessity; and

(2) the statutory barriers identified under subsection (a) that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.

§ 258. Illegal changes in subscriber carrier selections

(a) Prohibition. No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

(b) Liability for charges. Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the Commission may prescribe. The remedies provided by this subsection are in addition to any other remedies available by law.

§ 259. Infrastructure sharing

(a) Regulations required. The Commission shall prescribe, within one year after the date of enactment of the Telecommunications Act of 1996, regulations that require incumbent local exchange carriers (as defined in section 251(h)) to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e).

(b) Terms and conditions of regulations. The regulations prescribed by the Commission pursuant to this section shall—

(1) not require a local exchange carrier to which this section applies to take any action that is economically unreasonable or that is contrary to the public interest;

(2) permit, but shall not require, the joint ownership or operation of public switched network infrastructure and services by or among such local exchange carrier and a qualifying carrier;

(3) ensure that such local exchange carrier will not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section;

(4) ensure that such local exchange carrier makes such infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such local exchange carrier, as determined in accordance with guidelines prescribed by the Commission in regulations issued pursuant to this section;

(5) establish conditions that promote cooperation between local exchange carriers to which this section applies and qualifying carriers;

(6) not require a local exchange carrier to which this section applies to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area; and

(7) require that such local exchange carrier file with the Commission or State for public inspection, any tariffs, contracts, or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure and functions under this section.

(c) Information concerning deployment of new services and equipment. A local exchange carrier to which this section applies that has entered into an infrastructure sharing agreement under this section shall provide to each party to such agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment.

(d) Definition. For purposes of this section, the term "qualifying carrier" means a telecommunications carrier that—

(1) lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to this section; and

(2) offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under section 214(e).

§ 260. Provision of telemessaging service

(a) Nondiscrimination safeguards. Any local exchange carrier subject to the requirements of section 251(c) that provides telemessaging service—

(1) shall not subsidize its telemessaging service directly or indirectly from its telephone exchange service or its exchange access; and

(2) shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services.

(b) Expedited consideration of complaints. The Commission shall establish procedures for the receipt and review of complaints concerning violations of subsection (a)

or the regulations thereunder that result in material financial harm to a provider of telemessaging service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, the Commission shall, within 60 days after receipt of the complaint, order the local exchange carrier and any affiliates to cease engaging in such violation pending such final determination.

(c) Definition. As used in this section, the term "telemessaging service" means voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services.

§ 261. Effect on other requirements

(a) Commission regulations. Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

(b) Existing State regulations. Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements. Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the

State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

§ 303. Powers and duties of Commission

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

APPENDIX G

FROM *IN THE MATTER OF IMPLEMENTATION OF LOCAL COMPETITION PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996*, FIRST REPORT AND ORDER, CC DOCKET NO. 96-98 (AUG. 8, 1996):

¶¶ 1-137, 265-270, 289-97, 317-341, 704-707, 1296-1323 & Appendix B

I. INTRODUCTION, OVERVIEW, AND EXECUTIVE SUMMARY

A. The Telecommunications Act of 1996—A New Direction

1. The Telecommunications Act of 1996[1] fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *to be codified at* 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in the United States Code.

2. The 1996 Act also recasts the relationship between the FCC and state commissions responsible for regulating telecommunications services. Until now, we and our state counterparts generally have regulated the jurisdictional segments of this industry assigned to each of us by the Communications Act of 1934. The 1996 Act forges a new partnership between state and federal regulators. This arrangement is far better suited to the coming world of competition in which historical regulatory distinctions are supplanted by competitive forces. As this Order demonstrates, we have benefitted enormously from the expertise and experience that the state commissioners and their staffs have contributed to these discussions. We look forward to the continuation of that cooperative working relationship in the coming months as each of us carries out the role assigned by the 1996 Act.

3. Three principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition. In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in all telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.

4. These three goals are integrally related. Indeed, the relationship betwen fostering competition in local telecommunications markets and promoting greater competi-

tion in the long distance market is fundamental to the 1996 Act. Competiiton in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of any incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition. Under section 251, incumbent local exchange carriers (LECs), including the Bell Operating Companies (BOCs), are mandated to take several steps to open their networks to competition, including providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold. Under section 271, once the BOCs have taken the necessary steps, they are allowed to offer long distance service in areas where they provide local telephone service, if we find that entry meets the specific statutory requirements and is consistent with the public interest. Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications—the local exchange and exchange access markets—to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunicaitons markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.

5. The Act also recognizes, however, that universal service cannot be maintained without reform of the current subsidy system. The current universal service system is a patchwork quilt of implicit and explicit subsidies. These subsidies are intended to promote telephone subscribership, yet they do so at the expense of deterring or distorting competition. Some policies that traditionally

have been justified on universal service considerations place competitors at a disadvantage. Other universal service policies place the incumbent LECs at a competitive disadvantage. For example, LECs are required to charge interexchange carriers a Carrier Common Line charge for every minute of interstate traffic that any of their customers send or receive. This exposes LECs to competition from competitive access providers, which are not subject to this cost burden. Hence, section 254 of the Act requires the Commission, working with the states and consumer advocates through a Federal/State Joint Board, to revamp the methods by which universal service payments are collected and disbursed.[2] The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.

B. The Competition Trilogy: Section 251, Universal Service Reform and Access Charge Reform

6. The rules that we adopt to implement the local competition provisions of the 1996 Act represent only one part of a trilogy. In this Report and Order, we adopt initial rules designed to accomplish the first of the goals outlined above—opening the local exchange and exchange access markets to competition. The steps we take today are the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252. Given the dynamic nature of telecommunications technology and markets, it will be necessary over time to

[2] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposal Rulemaking *and Order Establishing Joint Board*, FCC 96-93 (rel. Mar. 8, 1996) (*Universal Service NPRM*).

review proactively and adjust these rules to ensure both that the statute's mandate of competition is effectuated and enforced, and that regulatory burdens are lifted as soon as competition eliminates the need for them. Efforts to review and revise these rules will be guided by the experience of states in their initial implementation efforts.

7. The second part of the trilogy is universal service reform. In early November, the Federal/State Universal Service Joint Board, including three members of this Commission, will makes its recommendations to the Commission. These recommendations will serve as the cornerstone of universal service reform. The Commission will act on the Joint Board's recommendations and adopt universal service rules not later than May 8, 1997, and, we hope, even earlier. Our universal service reform order, consistent with section 254, will rework the subsidy system to guarantee affordable service to all Americans in an era in which competition will be the driving force in telecommunications. By reforming the collection and distribution of universal service funds, the states and the Commission will also ensure that the goals of affordable service and access to advanced services are met by means that enhance, rather than distort, competition. Universal service reform is vitally connected to the local competition rules we adopt today.

8. The third part of the trilogy is access charge reform. It is widely recognized that, because a competitive market drives prices to cost, a system of charges which includes non-cost based components is inherently unstable and unsustainable. It also well-recognized that access charge reform is intensely interrelated with the local competition rules of section 251 and the reform of universal service. We will complete access reform before or concurrently with a final order on universal service.

9. Only when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished. Only when our counter-

parts at the state level complete implementing and supplementing these rules will the complete blueprint for competition be in place. Completion of the trilogy, coupled with the reduction in burdensome and inefficient regulation we have undertaken pursuant to other provisions of the 1996 Act, will unleash marketplace forces that will fuel economic growth. Until then, incumbents and new entrants must undergo a transition process toward fully competitive markets. We will, however, act quickly to complete the three essential rulemakings. We intend to issue a notice of proposed rulemaking in 1996 and to complete the access charge reform proceeding concurrently with the statutory deadline established for the section 254 rulemaking. This timetable will ensure that actions taken by the Joint Board in November and this Commission by not later than May 1997 in the universal service reform proceeding will be coordinated with the access reform docket.

C. Economic Barriers

10. As we pointed out in our Notice of Proposed Rulemaking in this docket[3], the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers.[4] Furthermore, absent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. Because

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98. Notice of Proposed Rulemaking, FCC 96-182 (rel. Apr. 19, 1996), 61 Fed. Reg. 18311 (Apr. 25, 1996) (NPRM).

[4] *See* NPRM at para. 6.

an incumbent LEC currently serves virtually all subscribers in its local serving area,[5] an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.

11. Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the monopolized local market must be removed. The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly. As we pointed out in our NPRM, the local competition provisions of the Act require that these economies be shared with entrants. We believe they should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices.[6] Congress also recognized that the transition to competition presents special considerations in markets served by smaller telephone companies, especially in rural areas.[7] We are mindful of these considerations, and know that they will be taken into account by state commissions as well.

12. The Act contemplates three paths of entry into the local market—the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and re-

[5] *See* NPRM at n.13.

[6] *See* NPRM at paras. 10-12.

[7] 47 U.S.C. § 251(f).

move economic impediments to each. We anticipate that some new entrants will follow multiple paths of entry as market conditions and access to capital permit. Some may enter by relying at first entirely on resale of the incumbent's services and then gradually deploying their own facilities. This strategy was employed successfully by MCI and Sprint in the interexchange market during the 1970's and 1980's. Others may use a combination of entry strategies simultaneously—whether in the same geographic market or in different ones. Some competitors may use unbundled network elements in combination with their own facilities to serve densely populated sections of an incumbent LEC's service territory, while using resold services to reach customers in less densely populated areas. Still other new entrants may pursue a single entry strategy that does not vary by geographic region or over time. Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored. As to success or failure, we look to the market, not to regulation, for the answer.

13. We note that an entrant, such as a cable company, that constructs its own network will not necessarily need the services or facilities of an incumbent LEC to enable its own subscribers to communicate with each other. A firm adopting this entry strategy, however, still will need an agreement with the incumbent LEC's to enable the entrant's customers to place calls to and receive calls from the incumbent LEC's subscribers.[8] Sections 251(b)(5) and (c)(2) require incumbent LECs to enter

[8] *See infra*, Section IV.A.

into such agreements on just, reasonable, and nondiscriminatory terms and to transport and terminate traffic originating on another carrier's network under reciprocal compensation arrangements. In this item, we adopt rules for states to apply in implementing these mandates of section 251 in their arbitration of interconnection disputes, as well as their review of such arbitrated arrangements, or a BOC's statement of generally available terms. We believe that our rules will assist the states in carrying out their responsibilities under the 1996 Act, thereby furthering the Act's goals of fostering prompt, efficient, competitive entry.

14. We also note that many new entrants will not have fully constructed their local networks when they begin to offer service.[9] Although they may provide some of their own facilities, these new entrants will be unable to reach all of their customers without depending on the incumbent's facilities. Hence, in addition to an arrangement for terminating traffic on the incumbent LEC's network, entrants will likely need agrments that enable them to obtain wholesale prices for services they wish to sell at retail and to use at least some portions of the incumbents' facilities, such as local loops and end office switching facilities.

15. Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. The statute addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be "just, reasonable

[9] Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong,. 2d Sess. 113 (1996) ("Joint Explanatory Statement") at 121.

and nondiscriminatory."[10] We adopt rules herein to implement these requirements of section 251(c)(3).

D. Operational Barriers

16. The statute also directs us to remove the existing operational barriers to entering the local market. Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. Our recently-issued number portability Report and Order addressed one of the most significant operational barriers to competition by permitting customers to retain their phone numbers when they change local carriers.[11]

17. Closely related to number portability is dialing parity, which we address in a companion order.[12] Dialing parity enables a customer of a new entrant to dial others with the convenience an incumbent provides, regardless of which carrier the customer has chosen as the local service provider. The history of competition in the interexchange market illustrates the critical importance of dialing parity to the successful introduction of competition in telecommunications markets. Equal access enabled customers of non-AT&T providers to enjoy the same convenience of dialing "1" plus the called party's number

[10] *See* 47 U.S.C. § 251(c)(3).

[11] *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-286 (rel. July 2, 1996) (*Number Portability Order*). Consistent with the 1996 Act, 47 U.S.C. § 251(b)(2), we required LECs to implement interim and long-term measures to ensure that customers can change their local service providers without having to change their phone number. Number portability promotes competition by making it less expensive and less disruptive for a customer to switch providers, thus freeing the customer to choose the local provider that offers the best value.

[12] NPRM paras. 202-219.

that AT&T customers had. Prior to equal access, subscribers to interexchange carriers (IXCs) other than AT&T often were required to dial more than 20 digits to place an interstate long-distance call. Industry data show that, after equal access was deployed throughout the country, the number of customers using MCI and other long-distance carriers increased significantly.[13] Thus, we believe that equal access had a substantial procompetitive impact. Dialing parity should have the same effect.

18. This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets. As an example, customers can voluntarily switch from one interexchange carrier to another extremely rapidly, through automated systems. This has been a boon to competition in the interexchange market. We expect that moving customers from one local carrier to another rapidly will be essential to fair local competition.

19. As competition in the local exchange market emerges, operational issues may be among the most difficult for the parties to resolve. Thus, we recognize that, along with the state commissions and the courts, we will be called upon to enforce provisions of arbitrated agreements and our rules relating to these operational barriers to entry. Because of the critical importance of eliminating these barriers to the accomplishment of the Act's procompetitive objectives, we intend to enforce our rules in a manner that is swift, sure, and effective. To this end

[13] Federal Communications Commission, STATISTICS OF COMMUNICATIONS COMMON CARRIERS 1994-95, at 344, Table 8.8; Federal Communications Commission, REPORT ON LONG DISTANCE MARKET SHARE, Second Quarter 1995, at 14, table 6 (Oct. 1995).

we will review, with the states, our enforcement techniques during the fourth quarter of 1996.

20. We recognize that during the transition from monopoly to competition it is vital that we and the states vigilantly and vigorously enforce the rules that we adopt today and that will be adopted in the future to open local markets to competition. If we fail to meet that responsibility, the actions that we take today to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective.

E. Transition

21. We consider it vitally important to establish a "pro-competitive, deregulatory national policy framework"[14] for local telephony competition, but we are acutely mindful of existing common carrier arrangements, relationships, and expectations, particularly those that affect incumbent LECs. In light of the timing issues described above, we think it wise to provide some appropriate transitions.

22. In this regard, this Order sets minimum, uniform, national rules, but also relies heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets. On those issues where the need to create a factual record distinct to a state or to balance unique local considerations is material, we ask the states to develop their own rules that are consistent with general guidance contained herein. The states will do so in rulemakings and in arbitrating interconnection arrangements. On other issues, particularly those related to pricing, we facilitate the ability of states to adopt immediate, temporary decisions by permitting the states to set proxy prices within a defined range or subject to a ceiling. We

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[14] Joint Explanatory Statement at 1.

believe that some states will find these alternatives useful in light of the strict deadlines of the law. For example, section 252(b)(4(C) requires a state commission to complete the arbitration of issues that have been referred to it, pursuant to section 252(b)(1), within nine months after the incumbent local exchange carrier received the request for negotiation. Selection of the actual prices within the range or subject to the ceiling will be for the state commission to determine. Some states may use proxies temporarily because they lack the resources necessary to review cost studies in rulemaking or arbitrations. Other states may lack adequate resources to complete such tasks before the expiration of the arbitration deadline. However, we encourage all states to complete the necessary work within the statutory deadline. Our expectation is that the bulk of interconnection arrangements will be concluded through arbitration or agreement, by the beginning of 1997. Not until then will we be able to determine more precisely the impact of this Order on promoting competition. Between now and then, we are eager to continue our work with the states. In this period, as set forth earlier, we should be able to take major steps toward implementing a new universal service system and far-reaching reform of interstate access. These reforms will reflect intensive dialogue between us and the states.

23. Similarly, as states implement the rules that we adopt in this order as well as their own decisions, they may find it useful to consult with us, either formally or informally, regarding particular aspects of these rules. We encourage and invite such inquiries because we believe that such consultations are likely to provide greater certainty to the states as they apply our rules to specific arbitration issues and possibly to reduce the burden of expensive judicial proceedings on states. A variety of formal and informal procedures exist under our rules for such consultations, and we may find it helpful to fashion others as we gain additional experience under the 1996 Act.

F. Executive Summary

1. Scope of Authority of the FCC and State Commissions

24. The Commission concludes that sections 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements. The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues. In the Report and Order, the Commission concludes that the states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition throughout the country, and that under this partnership, the FCC establishes uniform national rules for some issues, the states, and in some instances the FCC, administer these rules, and the states adopt additional rules that are critical to promoting local telephone competition. The rules that the FCC establishes in this Report and Order are minimum requirements upon which the states may build. The Commission also intends to review and amend the rules it adopts in this Report and Order to take into account competitive developments, states' experiences, and technological changes.

2. Duty to Negotiate in Good Faith

25. In the Report and Order, the Commission establishes some national rules regarding the duty to negotiate in good faith, but concludes that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. The Commission also concludes that, in many instances, whether a party has negotiated in good faith will need to be decided on a case-by-case basis, in light of the particular circumstances. The Commission notes that the arbitration process set forth in section 252 provides one

remedy for failing to negotiate in good faith. The Commission also concludes that agreements that were negotiated before the 1996 Act was enacted, including agreements between neighboring LECs, must be filed for review by the state commission pursuant to section 252(a). If the state commission approves such agreements, the terms of those agreements must be made available to requesting telecommunications carriers in accordance with section 252(i).

3. Interconnection

26. Section 251(c)(2) requires incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point. The interconnection must be at least equal in quality to that provided by the incumbent LEC to itself or its affiliates, and must be provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The Commission concludes that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. The Commission identifies a minimum set of five "technically feasible" points at which incumbent LECs must provide interconnection: (1) the line side of a local switch (for example, at the main distribution frame); (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signalling facilities, such as signalling transfer points, necessary to exchange traffic and access call-related databases. In addition, the points of access to unbundled elements (discussed below) are also technically feasible points of interconnection. The Commission finds that telecommunications carriers may request interconnection under section 251(c)(2) to provide telephone exchange or exchange access service, or both. If the request is for such purpose, the incumbent LEC must provide interconnection in accordance with section 251(c)(2) and the Commission's rules there-

under to any telecommunications carrier, including interexchange carriers and commercial mobile radio service (CMRS) providers.

4. Access to Unbundled Elements

27. Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. In the Report and Order, the Commission identifies a minimum set of network elements that incumbent LECs must provide under this section. States may require incumbent LECs to provide additional network elements on an unbundled basis. The minimum set of network elements the Commission identifies are: local loops, local and tandem switches (including all vertical switching features provided by such switches), interoffice transmission facilities, network interface devices, signalling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities. The Commission concludes that incumbent LECs must provide nondiscrimination access to operations support systems functions by January 1, 1997. The Commission concludes that access to such operations support systems is critical to affording new entrants a meaningful opportunity to compete with incumbent LECs. The Commission also concludes that incumbent LECs are required to provide access to network elements in a manner that allows requesting carriers to combine such elements as they choose, and that incumbent LECs may not impose restrictions upon the uses to which requesting carriers put such network elements.

5. Methods of Obtaining Interconnection and Access to Unbundled Elements

28. Section 251(c)(6) requires incumbent LECs to provide physical collocation of equipment necessary for

interconnection or access to unbundled network elements at the incumbent LEC's premises, except that the incumbent LEC may provide virtual collocation if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. The Commission concludes that incumbent LECs are required to provide for any technically feasible method of interconnection or access requested by a telecommunications carrier, including physical collocation, virtual collocation, and interconnection at meet points. The Commission adopts, with certain modifications, some of the physical and virtual collocation requirements it adopted earlier in the *Expanded Interconnection* proceeding. The Commisssion also establishes rules interpreting the requirements of section 251(c)(6).

6. Pricing Methodologies

29. The 1996 Act requires the states to set prices for interconnection and unbundled elements that are cost-based, nondiscriminatory, and may include a reasonable profit. To help the states accomplish this, the Commission concludes that the state commissions should set arbitrated rates for interconnection and access to unbundled elements pursuant a forward-looking economic cost pricing methodology. The Commission concludes that the prices that new entrants pay for interconnection and unbundled elements should be based on the local telephone companies Total Service Long Run Incremental Cost of a particular network element, which the Commission calls "Total Element Long-Run Incremental Cost" (TELRIC), plus a reasonable share of forward-looking joint and common costs. States will determine, among other things, the appropriate risk-adjusted cost of capital and depreciation rates. For states that are unable to conduct a cost study and apply an economic costing methodology within the statutory time frame for arbitrating interconnection disputes, the Commission establishes de-

fault ceilings and ranges for the states to apply, on an interim basis, to interconnection arrangements. The Commission establishes a default range of 0.2-0.4 cents per minute for switching. For tandem switching, the Commission establishes a default ceiling of 0.15 cents per minute. The Order also establishes default ceilings for the other unbundled network elements.

7. Access Charges for Unbundled Switching

30. Nothing in this Report and Order alters the collection of access charges paid by an interexchange carrier under Part 69 of the Commission's rules, when the incumbent LEC provides exchange access service to an interexchange carrier, either directly or through service resale. Because access charges are not included in the cost-based prices for unbundled network elements, and because certain portions of access charges currently support the provision of universal service, until the access charge reform and universal service proceedings have been completed, the Commission continues to provide for a certain portion of access charge recovery with respect to use of an incumbent LEC's unbundled switching element, for a defined period of time. This will minimize the possibility that the incumbent LEC will be able to "double recover," through access charges, the facility costs that new entrants have already paid to purchase unbundled elements, while preserving the status quo with respect to subsidy payments. Incumbent LECs will recover from interconnecting carriers the carrier common line charge and a charge equal to 75% of the transport interconnection charge for all interstate minutes traversing the incumbent LECs local switches for which the interconnecting carriers pay unbundled network element charges. This aspect of the Order expires at the earliest of: 1) June 30, 1997; 2) the effective date of final decisions by the Commission in the universal service and access reform proceedings; or 3) if the incumbent LEC is a Bell Operating

Company (BOC), the date on which that BOC is authorized under section 271 of the Act to provide in-region interLATA service, for any given state.

31. For a similar limited period, incumbent LECs may charge the same portions of any intrastate access charges comparable to the carrier common line charge (CCLC) and the transport interconnection charge (TIC), as well as any existing explicit universal service support mechanisms based on intrastate access charges. During this period, incumbent LECs may continue to recover such revenues from purchasers of unbundled local switching elements that use those elements to originate or terminate intrastate toll calls for end user customers they win from incumbent LECs. These state mechanisms must end on the earlier of: (1) June 30, 1997; (2) the effective date of a state commission decision that an incumbent LEC may not assess such charges; and (3) if the incumbent LEC that receives the access charge revenues is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer in-region interLATA service. The last end date will apply only to the recovery of charges in those states in which the BOC is authorized to offer interLATA service.

8. Resale

32. The 1996 Act requires all incumbent LECs to offer for resale any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks. State commissions must identify marketing, billing, collection, and other costs that will be avoided or that are avoidable by incumbent

LECs when they provide services wholesale, and calculate the portion of the retail rates for those services that is attributable to the avoided and avoidable costs. The Commission identifies certain avoided costs, and the application of this definition is left to the states. If a state elects not to implement the methodology, it may elect, on an interim basis, a discount rate from within a default range of discount rates established by the Commission. The Commission identifies certain avoided costs, and the application of this definition is left to the states. If a state elects not to implement the methodology, it may elect, on an interim basis, a discount rate from within a default range of discount rates established by the Commission. The Commission establishes a default discount range of 17-25% off retail prices, leaving the states to set the specific rate within that range, in the exercise of their discretion.

9. Requesting Telecommunications Carriers

33. The Commission concludes that, to the extent that a carrier is engaged in providing for a fee local, interexchange, or international basic services, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier is a "telecommunications carrier," and is thus subject to the requirements of section 251(a) and the benefits of section 251(c). The Commission concludes that CMRS providers are telecommunications carriers, and that private mobile radio service (PMRS) providers generally are not telecommunications carriers, except to the extent that a PMRS provider uses excess capacity to provide local, interexchange, or international services for a fee directly to the public. The Commission also concludes that, if a company provides both telecommunications services and information services, it must be classified as a telecommunications carrier.

10. Commercial Mobile Radio Service

34. The Commission concludes that LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2) to enter into reciprocal compensation arrangements with CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks. The Commission concludes that many CMRS providers (specifically cellular, broadband PCS and covered specialized mobile radio (SMR) providers) offer telephone exchange service and exchange access, and that incumbent LECs therefore must make interconnection available to these CMRS providers in conformity with sections 251(c) and 252. The Commission concludes that CMRS providers should not be classified as LECs at this time. The Commission also concludes htat it may apply section 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, the Commission is not finding that section 332 jurisdiction over interconnection has been repealed by implication, and the Commission acknowledges that section 332, in tandem with section 201, is a basis for jurisdiction over LEC-CMRS interconnection.

11. Transport and Termination

35. The 1996 Act requires that charges for transport and termination of traffic set based on "additional cost." The Commission concludes that state commissions, during arbitrations, should set symmetrical prices based on the local telephone company's forward-looking economic costs. The state commissions would use the TELRIC methodology when establishing rates for transport and termination. The Commission establishes a default range of 0.2-0.4 cents per minute for end office termination for states which have not conducted a TELRIC cost study. The Commission finds significant evidence in the record in support of the lower end of the range. In addition, the

Commission finds that additional reciprocal charges could apply to termination through a tandem switch. The default ceiling for tandem switching is 0.15 cents per minute, plus applicable charges for transport from the tandem switch to the end office. Each state opting for the default approach for a limited period of time, may select a rate within that range.

12. Access to Rights of Way

36. The Commission amends its rules to implement the pole attachment provisions of the 1996 Act. Specifically, the Commission establishes procedures for nondiscriminatory access by cable television systems and telecommunications carriers to poles, conduits, and rights-of way owned by utilities or LECs. The Order includes several specific rules as well as a number of more general guidelines designed to facilitate the negotiation and mutual performance of fair, pro-competitive access agreements without the need for regulatory intervention. Additionally, an expedited dispute resolution is provided when good faith negotiations fail, as are requirements concerning modifications to poles, ducts, conduits, and rights-of-way and the allocation of the costs of such modifications.

13. Obligations Imposed on non-incumbent LECs

37. The Commission concludes that states generally may not impose on non-incumbent LECs the obligations set forth in section 251(c) entitled, "Additional Obligations on Incumbent Local Exchange Carriers." Section 251(h)(2) sets forth a process by which the Commission may decide to treat LECs as incumbent LECs, and state commissions or other interested parties may ask the Commission to issue a rule, in accordance with section 251 (h)(2), providing for the treatment of a LEC as an incumbent LEC. In addition to this Report and Order, the Commission addresses in separate proceedings some

of the obligations, such as dialing parity and number portability, that section 251(b) imposes on all LECs.

14. Exemptions, Suspensions, and Modifications of Section 251 Requirements

38. Section 251(f)(1) provides for exemption from the reuiqrements in section 251(c) for rural telephone companies (as defined by the 1996 Act) under certain circumstances. Section 251(f)(2) permits LECs with fewer than 2 percent of the nation's subscriber lines to petition for suspension or modification of the requirements in sections 251(b) or (c). In the Report and Order, the Commission establishes a very limited set of rules interpreting the requirements of section 251(f). For example, the Commission finds that LECs bear the burden of proving to the state commission that a suspension or modification of the requirements of section 251(b) or (c) is justified. Rural LECs bear the burden of proving that continued exemption of the requirements of section 251(c) is justified, once a bona fide request has been made by a carrier under section 251. The Commission also concludes that only LECs that, at the holding company level, have fewer than 2 percent of the nation's subscriber lines are entitled to petition for suspension or modification of requirements under section 251(f)(2). For the most part, however, the states will interpret the provisions of section 251(f) through rulemaking and adjudicative proceedings, and will be responsible for determining whether a LEC in a particular instance is entitled to exemption; suspension, or modification of section 251 requirements.

15. Commission Responsibilities Under Section 252

39. Section 252(e)(5) requires the Commission to assume the state's responsibilities under section 252 if the state "fails to act to carry out its responsibility" under that section. In the Report and Order, the Commission

adopts a minimum set of rules that will provide notice of the standards and procedures that the Commission will use if it has to assume the responsibility of a state commission under section 252(e)(5). The Commission concludes that, if it arbitrates agreements, it will use a "final offer" arbitration method, under which each party to the arbitration proposes its best and final offer, and the arbitrator chooses among the proposals. The arbitrator could choose a proposal in its entirety, or could choose different parties' proposals on an issue-by-issue basis. In addition, the parties could continue to negotiate an agreement after they submit their proposals and before the arbitrator makes a decision.

40. Section 252(i) of the 1996 Act requires that incumbent LECs make available to any requesting telecommunications carrier any individual interconnection, service, or network element on the same terms and conditions as contained in any agreement approved under Section 252 to which they are a party. The Commission concludes that section 252(i) entitles all carriers with interconnection agreements to "most favored nation" status regardless of whether such a clause is in their agreement. Carriers may obtain any individual interconnection, service, or network element under the same terms and conditions as contained in any publicly filed interconnection agreement without having to agree to the entire agreement. Additionally, carriers seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but instetd may obtain access to agreement provisions on an expedited basis.

II. SCOPE OF THE COMMISSION'S RULES

41. In implementing section 251, we conclude that some national rules are necessary to promote Congress's goals for a national policy framework and serve the public interest, and that states should have the major re-

sposibility for prescribing the specific terms and conditions that will lead to competition in local exchange markets. Our approach in this Report and Order has been a pragmatic one, consistent with the Act, with respect to this allocation of responsibilities. We believe that the steps necessary to implement section 251 are not appropriately characterized as a choice between specific national rules on the one hand and substantial state discretion on the other. We adopt national rules where they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish. This is consistent with our obligation to "complete all actions necessary to establish regulations to implement the requirements" of section 251.[15] Some of these rules will be relatively self-executing. In many instances, however, the rules we establish call on the states to exercise significant discretion and to make critical decisions through arbitrations and development of state-specific rules. Over time, we will continue to review the allocation of responsibilities, and we will reallocate them if it appears that we have inappropriately or inefficiently designated the decisionmaking roles.

42. The decisions in this Report and Order, and in this Section in particular, benefit from valuable insights provided by states based on their experiences in establishing rules and taking other actions intended to foster local competition. Through formal comments, *ex parte* meetings, and open forums,[16] state commissioners and their

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[15] 47 U.S.C. § 251(d)(1).

[16] Public forum held on March 15, 1996, by FCC's Office of General Counsel to discuss interpretation of sections 251 and 252 of

staffs provided extensive, detailed information to us regarding difficult or complex issues that they have encountered, and the various approaches they have adopted to address those issues. Information from the states highlighted both differences among communities within states, as well as similarities among states. Recent state rules and orders that take into account the local competition provisions of the 1996 Act have been particularly helpful to our deliberations about the types of national rules that will best further the statute's goal of encouraging local telephone competition.[17] These state decisions also offered useful insights in determining the extent to which the Commission should set forth uniform national rules, and the extent to which we should ensure that states can impose varying requirements. Our contact with state commissioners and their staffs, as well as recent state

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the Telecommunications Act of 1996; public forum held on July 9, 1996, by FCC's Common Carrier Bureau and Office of General Counsel to discuss implementation of section 271 of the Telecommunications Act of 1996.

[17] *See, e.g.*, Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Condition and the Initial Unbundling of Services, Docket No. 6352-U (Georgia Commission May 29, 1996); AT&T Communications of Illinois, Inc. *et al.*, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996); Hawaii Administrative Rules, Ch. 6-80, "Competition in Telecommunications Services," (Hawaii Commission May 17, 1996); Public Utilities Commission of Ohio Case No. 95-845-TP-COI (Local Competition) (Ohio Commission June 12, 1996) and Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996, Case No. 96-463-TP-UNC (Ohio Commission May 30, 1996); Proposed Rules regarding Implementation of §§ 40-15-101 *et seq.* Requirements relating to Interconnection and Unbundling, Docket No. 95R-556T (Colorado Commission April 25, 1996) (one of a series of Orders adopted by the Colorado Commission in response to the local competition provisions of the 1996 Act); Washington Utilities and Transportation Commission, Fifteenth Supplemental Order, Decision and Order Rejecting Tariff Revisions, Requiring Refiling, Docket No. UT-950200 (Washington Commission April 1996).

actions, make clear that states and the FCC share a common commitment to creating opportunities for efficient new entry into the local telephone market. Our experience in working with state commissions since passage of the 1996 Act confirms that we will achieve that goal most effectively and quickly by working cooperatively with one another now and in the future as the country's emerging competition policy presents new difficulties and opportunities.

43. We also received helpful advice and assistance from other government agencies, including the National Telecommunications and Information Administration (NTIA), the Department of Justice, and the Department of Defense about how national rules could further the public interest. In addition, comments from industry members and consumer advocacy groups helped us understand better the varying and competing concerns of consumers and different representatives of the telecommunications industry. We benefitted as well by discovering that there are certain matters on which there is substantial agreement about the role the Commission should play in establishing and enforcing provisions of section 251.

A. Advantages and Disadvantages of National Rules

1. Background

44. Section 251(d)(1) instructs the Commission, within six months after the enactment of the 1996 Act (that is, by August 8, 1996), to "establish regulations to implement the requirements of [section 251]."[18] In addition, section 253 requires the Commission to preempt the enforcement of any state or local statute, regulation, or legal requirement that "prohibit[s] or [has] the effect of

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[18] 47 U.S.C. § 251(d)(1). The Commission's implementing rules should be designed "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Explanatory Statement at 1.

prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [19]

45. In the NPRM, we stated our belief that we should implement Congress's goal of a pro-competitive, deregulatory, national policy framework by adopting national rules that are designed to secure the full benefits of competition for consumers, with due regard to work already done by the states.[20] We sought comment on the extent to which we should adopt explicit national rules, and the extent to which permitting variations among states would further Congress's pro-competitive goals.[21] We anticipated that we would rely on actions some states have already taken to address interconnection and other issues related to opening local markets to competition. In the NPRM, we set forth some of the benefits that would likely result from implementing explicit national rules, and some of the benefits that would likely result from allowing variations among states.[22]

2. Comments

46. The parties recommend a broad spectrum of approaches with respect to the scope and detail of Commission regulations. The vast majority of potential local competitors, such as interexchange carriers (IXCs), competitive access providers (CAPs), and cable operators, assert that the Commission should adopt clear and explicit national standards that will serve as the backdrop for negotiaitons and will establish minimum requirements for arbitrated agreements.[23] Other parties, including federal

[19] 47 U.S.C. § 253(a) and (d).

[20] NPRM at para. 26 (*citing* Joint Explanatory Statement at 1).

[21] NPRM at paras. 27, 35.

[22] NPRM at paras. 30-33.

[23] *See, e.g.*, AT&T comments at 3; MCI comments at 4-6; Sprint comments at 4-6; MFS comments at 5-6; Jones Intercable comments at 11, 13; Cable & Wireless comments at 6-7; LCI comments at 2,

agencies, consumer groups, and equipment manufacturers, also support explicit national rules.[24] These parties contend that explicit national standards are useful, or even critical, to achieving the pro-competitive goals enunciated by Congress.

47. Parties supporting explicit national rules assert that national standards will give incumbent LECs an incentive to negotiate if the national rules would subject the incumbents to less advantageous terms than they otherwise would be likely to negotiate.[25] Other advantages of national standards, according to these parties, include: reducing the likelihood of potentially inconsistent deter-

13; TCC comments at 5-6; Hyperion comments at 6; Ad Hoc Telecommunications Users Committee comments at 3-10; LDDS reply at 4.

[24] *See, e.g.*, SBA comments at 4; Ohio Consumers' Counsel comments at 2-3; DoJ comments at 5-8; Lucent comments at 3; Frontier reply at 7; IDCMA reply at 2-9; NTIA reply at 3; National Association of the Deaf reply at 1-3; Texas Public Utility Counsel reply at 2.

[25] *See, e.g.*, AT&T comments at 6-8 (noting that this is particularly true for non-BOC incumbent LECs, such as SNET and GTE, which already have interLATA authority and have no reason to comply with section 251); Cable & Wireless comments at 7-9; Hyperion comments at 7; MFS comments at 5-6; Teleport comments at 14-17 (vague standards will allow incumbents to adopt a "take it or leave it" approach); TCC comments at 5-7; Comcast reply at 5; CompTel reply at 7; LDDS reply at 3-4; NTLA reply at 3; PageNet reply at 4; *see also* Citizens Utilities comments at 5 (FCC should establish minimum standards sufficient to equalize bargaining power between incumbents and new entrants); Cox comments at 10; Excel comments at 2-3. *But see, e.g.*, Ameritech comments at 7-9 (incumbent LECs do not have vastly superior bargaining power, and cannot unilaterally impose terms upon other parties); PacTel comments at 6; USTA comments at 6 n.9 (the NPRM overstates the bargaining power of incumbent LECs; in particular, non-BOC LECs may have elss bargaining power than IXCs, cable companies, or competitive access providers); USTA reply at 2-4; Bell Atlantic reply at 3.

minations by state commissions and courts,[26] and reducing burdens on new entrants that seek to provide service on a regional or national basis by limiting their need for separate network configurations and marketing strategies, and by increasing predictability.[27] As a result, they assert, new entrants would have greater access to capital necessary to develop competing services.[28] Parties state that collectively, these advantages demonstrate that national standards will foster competition more quickly than regulations developed on a state-by-state basis.[29] In addition, some parties contend that clear national standards also

[26] ALTS comments at 2-4; ACSI comments at 4; AT&T comments at 9-10; Cox comments at 22-23; DoJ comments at 12; Frontier comments at 6; GSA/DoD comments at 4-5; TIA comments at 5; MCI comments at 4-6 (differing rules will make it difficult to develop a rational national policy); TCC comments at 7-8, 13 (federal rules will eliminate the need for new entrants to expend resources fighting the same battel in 50 states); *accord* Cable & Wireless comments at 10 (even 50 excellent plans are not optimal if they are 50 different plans).

[27] AT&T comments at 9; Cable & Wireless comments at 6-9 (cost efficiencies of national networks are substantial); Excel comments at 2; Hyperion comments at 5; GST comments at 2; Jones Intercable comments at 11; Ohio Consumers' Counsel comments at 3; SBA comments at 4 (national rules will particularly help small competitors); Sprint comments at 3; TCC comments at 7-8; ACSI reply at 4; *see also* Intermedia comments at 3 (national uniform standards are necessary to resolve the many regulatory, technical and operational questions that accompany interconnection to incumbent LEC networks); Lucent comments at 3 (national standards will promote industry growth and assist telecommunications equipment vendors); SDN Users Association comments at 2; International Communications Ass'n comments at 3.

[28] ALTS comments at 2-4; GSA/DoD comments at 4-5; MCI comments at 4-6. *But see* GTE reply at 6 (uniform federal rules will not affect the ability of large, financially well-positioned entities like AT&T to obtain capital).

[29] *See, e.g.*, ALTS comments at 2-4; Competition Policy Institute comments at 10; DoJ comments at 13-15 (a single set of rules can be created faster than 50 different sets).

will assist both the states in arbitrating and reviewing agreements within the time frames set forth in section 252 and the FCC in arbitrating agreements under section 252(e)(5) where states have failed to act, and in reviewing BOC applications to enter in-region interLATA markets pursuant to section 271.[30] Some parties that favor strong national rules caution against prematurely dismantling consumer protection rules and relying instead on competitiev market conditions that do not yet exist.[31] Many commercial mobile radio service (CMRS) providers contend that national rules governing LEC-CMRS interconnection are necessary ot foster development of a ubiquitous, nationwide network.[32]

48. Some state regulatory commissions advocate explicit national standards, at least in some areas. For example, the Massachusetts Commission states that the FCC can and should establish national rules in implementing section 251, except in the area of pricing.[33] The Kentucky Commission asserts that uniform national rules for market entry are necessary to ensure successful local competition, and that national pricing principles will aid states in setting rates during the arbitration process and in reviewing BOC statements of generally available terms.[34] The North Dakota Commission asserts that,

[30] Ad Hoc Telecommunications Users Committee comments at 9-10; AT&T comments at 8-9, 11; Cable & Wireless comments at 7-9; CompTel comments at 22; Excel comments at 2.

[31] *See, e.g.*, Competition Policy Institute reply at 2, 11.

[32] *See, e.g.*, Vanguard comments in CC Docket No. 95-185 at 26; Centennial comments in CC Docket No. 95-185 at 31.

[33] Mass. Commission comments at 4-5. What, if any, rules the Commission should, as both a legal and policy matter, adopt with respect to pricing is addressed separately in *infra*, Section II.D.

[34] Kentucky Commission comments at 3-4. Section 252(f) permits a BOC to file for review by a state commission a statement of terms and conditions that the BOC offers to comply with the regulations of section 251 and the regulations thereunder. A BOC may be per-

while some states may not need federal support, specific standards would provide a necessary and significant benefit for North Dakota, in light of its limited resources to implement a pro-competitive regulatory regime.[35] The Illinois Commission states that minimum national rules are a major step toward competitive markets, but that states should be permitted to implement and enforce additional rules.[36]

49. Some parties contend that national rules are particularly important for small competitors' entry into local markets.[37] Barriers to market entry, which cause delay, raise transactional costs, or otherwise impose economically inefficient constraints, are particularly threatening to small competitors, according to the Small Business Administration. Moreover, the Small Business Administration contends that the needs of small competitors deserve special consideration, because they are likely to fill niche market needs that larger competitors typically overlook.[38]

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mitted to provide in-region interLATA service if, ten months after enactment of the 1996 Act, no carrier has requested access and interconnection (as described in section 271(c)(1)(A)) and the BOC has a statement of generally available terms and condition that a state commission has approved or permitted to take effect. *See also* Kansas Commission comments at 4-5 (national interconnection standards to enable inter-company provisioning and national performance standards will facilitate negotiations and reduce the incumbent's negotiating advantage).

[35] North Dakota Commission comments at 1-2; *see also* Illinois Commission comments at 9-10 (minimum federal standards will give direction to states, will help create consistency among states, and will serve as a major step in the transition toward a competitive market, but states should be able to augment and build upon national standards).

[36] Illinois Commission comments at 9-10.

[37] *See, e.g.*, SBA comments at 3-4.

[38] *Id.; accord, e.g.*, Richard N. Koch comments at 1-2; ATSI reply at 7-8. *Contra, e.g.*, Colorado Ind. Tel. Ass'n comments at 2-3;

50. Other commenters oppose explicit national rules, or seek significant limits on the scope and detail of FCC requirements. The mjority of state commissions and incumbent LECs advocate that the Commission establish general, broad regulations or guidelines, and leave substantial opportunity for the parties to negotiate specific terms,[39] with the states to establish specific requirements if the parties cannot reach agreement.[40] BellSouth urges the Commission merely to codify the language of the 1996 Act.[41]

51. Parties that oppose explicit national standards assert that they are contrary to the Act,[42] could impede the

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GVNW comments at 2; NARUC comments at 8; Joint Consumer Advocates reply at 5-6 (national standards will be particularly burdensome for small or rural LECs, and will make it difficult for "niche" providers to succeed); Rural Tel. Coalition comments at 4-8.

[39] Ameritech comments at 6; Bell Atlantic comments at 2-3; Georgia Commission comments at 3-5; Illinois Commission comments at 13; Lincoln Tel. comments at 3-4; Rural Tel. Coalition comments at 2; South Carolina Commission comments at 2-3; SBC comments at 4-5, 19-21; TDS comments at 3 (Congress evinced a preference for voluntarily negotiated agreements and the FCC should not try to alter the Act's mechanisms for transitioning to competition); USTA comments at 6; Ohio Consumers' Counsel reply at 3.

[40] *See, e.g.*, USTA comments at 6-8; Alabama Commission comments at 10; Ameritech comments at 4, 6; Bell Atlantic comments at 1-2; Iowa Commission comments at 2, 4; NARUC comments at 4, 22-24; Idaho Commission comments at 2-4; North Carolina Commission Staff comments at 10-11; Oklahoma Commission comments at 1-3; Puerto Rico Tel. comments at 3-4; *accord* Alliance for Public Technology comments at 8-10; CFA/CU comments at 4-5; Rural Tel. Coalition comments at 2, 6; TDS comments at 3; Texas Commission comments at 4-5.

[41] BellSouth comments at 3-5.

[42] Alaska Tel. Ass'n comments at 2; Ameritech comments at 9; Bell Atlantic comments at 2-3; GTE comments at 12-14; Puerto Rico Tel. comments at 2-3; Rural Tel. Coalition comments at 2, 6; SBC comments at 8-10, 18-19.

development of local competition,[43] and will undermine progressive actions already taken by states.[44] They also assert that states should be given the opportunity to experiment with different approaches intended to promote local competition,[45] and that technical, economic, geographic, and demographic variaitons require tailored responses by state commissions.[46] For example, GTE states that, "[i]n reality, each local market is different—some are flat, others are hilly or mountainous; some are densely populated, others are suburban or rural; some have state-of-the-art technology, others retain older facilities; some possess a temperate climate, others suffer harsh storms; some are wealthy, others are poor; some have a high

[43] Ad Hoc Coalition of Corporate Telecommunications Managers comments at 2; BellSouth comments at 3-5; District of Columbia Commission comments at 11-12; Georgia Commission comments at 2; Maryland Commission comments at 2-3; Oregon Commission comments at 7, 25; Pac Tel comments at 1-3; California Commission reply at 8; *see also* Illinois Commission comments at 9-10 (overly extensive federal regulation could inhibit competition by restricting a state's ability to respond to technological and market developments and regional differences).

[44] Connecticut Commission comments at 8-9; GTE comments at 10; Maryland Commission comments at 5-6, 12; MECA comments at 11-12; Municipal Utilities comments at 6-8; North Carolina Commission Staff comments at 9-10; Oregon Commission comments at iv, 7; PacTel comments at 1-3; Washington Commission comments at 1-2.

[45] *See, e.g.*, Alliance for Public Technology comments at 8-10; Florida Commission comments at 2-3, 6; New York Commission comments at 18-19; Pennsylvania Commission comments at 17; TDS comments at 11.

[46] *See, e.g.*, District of Columbia Commission comments at 7; North Carolina Commission comments at 2-8; Wyoming Commission comments at 4-5 (Wyoming is rural and sparsely populated, and has among the highest costs in the country, but residents in both cities and rural areas require access to sophisticated services; it cannot "afford to be subjected needlessly to the problems which models designed to address other people's problems would cause").

proportion of business customers, others are predominantly residential."[47] Many parties counter that geographic differences do not merit state-specific rules instead of national rules.[48] They contend that the differences cited by GTE exist among different locals, but that many states include most of these variations within their borders.[49]

52. State commissions and incumbent LECs reject the suggestion that the FCC is required to impose nationally uniform requirements in order to achieve Congress's goals. For example, in support of its claim that Congress did not intend national uniformity, the New York Commission cites the fact that agreements may be negotiated without reference to the Commission's regulations under section 251(b) and (c), and that under section 251(d)(3), states may impose rules consistent with the Act.[50]

3. Discussion

53. Comments and *ex parte* discussions with state commission representatives have convinced us that we share with states a common goal of promoting competition in local exchange markets. We conclude that states and the FCC can craft a working relationship that is built on mutual commitment to local service competition throughout the country, in which the FCC establishes

[47] GTE comments at 7-8.

[48] ALTS comments at 4 (aside from universal service issues that are being addressed by a Joint Board in a separate proceeding, there are no unique policy concerns that states need to address or that would be endangered by national rules); Cable & Wireless comments at 9; DoJ comments at 13-15; GCI comments at 4; MCI comments at 4-6 (networks are not designed on a state-specific basis); Jones Intercable comments at 12; Cox reply at 4 n.8.

[49] *See, e.g.*, AT&T comments at 12.

[50] New York Commission comments at 12-13; *see also* Maryland Commission comments at 9, 13, 20; Washington Commission comments at 7-8 (referencing section 252(e)(3)); Rural Tel. Coalition reply at 6.

uniform, national rules for some issues, the states and the FCC administer these rules, and the states adopt other critically important rules to promote competition. In implementing the national rules we adopt in this Report and Order, states will help to illuminate and develop innovative solutions regarding many complex issues for which we have not attempted to prescribe national rules at this time, and states will adopt specific rules that take into account local concerns. In this Report and Order, and in subsequent actions we intend to take, we have and will continue to seek guidance from various states that have taken the lead in establishing pro-competitive requirements.[51] Virtually every decision in this Report and Order borrows from decisions reached at the state level, and we expect this close association with and reliance on the states to continue in the future. We therefore encourage states to continue to pursue their own pro-competitive policies. Indeed, we hope and expect that this Report and Order will foster an interactive process by which a number of policies consistent with the 1996 Act are generated by states.

54. We find that certain national rules are consistent with the terms and the goals of the statute. Section 251 sets forth a number of rights with respect to interconnection, resale services, and unbundled network elements. We conclude that the Commission should define at least certain minimum obligations that section 251 requires, respectively, of all telecommunications carriers, LECs, or incumbent LECs. For example, as discussed in more detail below, we conclude that it is reasonable to identify a minimum number of network elements that incumbent LECs must unbundle and make available to requesting carriers pursuant to the standards set forth in sections 251(c) and (d), while also permitting states to go beyond

[51] We also expect to rely heavily on state input and experience in other FCC proceedings, such as access reform and petitions concerning BOC entry into in-region interLATA markets.

that minimum list and impose additional requirements that are consistent with the 1996 Act and the FCC's implementing rules. We find no basis for permitting an incumbent LEC in some states not to make available these minimum technically feasible network elements that are provided by incumbent LECs in other states. We point out, however, that a uniform rule does not necessarily mean uniform results. For example, a national pricing methodology takes into account local factors and inputs, and thus may lead to different prices in different states, and different regions within states. In addition, parties that voluntarily negotiate agreements need not comply with the requirements we establish under sections 251(b) and (c), including any pricing rules we adopt.[52] We intend to review on an ongoing basis the rules we adopt herein in light of competitive developments, states' experiences, and technological changes.

55. We find that incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services. Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market. Therefore, although the 1996 Act requires incumbent LECs, for example, to provide interconnection and access to unbundled elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, incumbent LECs have strong incentives to resist such obligations. The inequality of bargaining

[52] 47 U.S.C. § 252(a)(1).

power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets. National (as opposed to state) rules more directly address these competive circumstances.

56. We emphasize that, under the statute, parties may voluntarily negotiate agreements "without regard to" the rules that we establish under sections 251(b) and (c).[53] However, fair negotiations will be expedited by the promulgation of national rules. Similarly, state arbitration of interconnection agreements now and in the future will be expedited and simplified by a clear statement of terms that must be included in every arbitrated agreement, absent mutual consent to different terms. Such efficiency and predictability should facilitate entry decisions, and in turn enhance opportunities for local exchange competition. In addition, for new entrants seeking to provide service on a national or regional basis, minimum national requirements may reduce the need for designing costly multiple network configurations and marketing strategies, and allow more efficient competition. More efficient competition will, in turn, benefit consumers. Further, national rules will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants and incumbents.

57. We also believe that some explicit national standards will be helpful in enabling the Commission and the states to carry out other responsibilities under the 1996 Act. For example, national standards will enable the Commission to address issues swiftly if the Commission is obligated to assume section 252 responsibilities because a state commission has failed to act.[54] In addition, BOCs

[53] 47 U.S.C. § 252(a)(1).

[54] *See* 47 U.S.C. § 252(e)(5).

that seek to offer long distance service in their service areas must satisfy, *inter alia*, a "competitive checklist" set forth in section 271(c)(2)(B). Many of the competitive checklist provisions require compliance with specific provisions of section 251. For example, the checklist requires BOCs to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[55] Some national rules also will help the states, the DOJ, and the FCC carry out their responsibilities under section 271, and assist BOCs in determining what steps must be taken to meet the requirements of section 271(c)(2)(B), the competitive checklist. In addition, national rules that establish the minimum requirements of section 251 will provide states with a consistent standard against which to conduct the fact-intensive process of verifying checklist compliance, the DOJ will have standards against which to evaluate the applications, and we will have standards to apply in adjudicating section 271 petitions in an extremely compressed time frame. Moreover, we believe that establishing minimum requirements that arbitrated agreements must satisfy will assist states in arbitrating and reviewing agreements under section 252, particularly in light of the relatively short time frames for such state action. While some states reject the idea that national rules will help the state commissions to satisfy their obligations under section 252 to mediate, arbitrate, and review agreements, other states have welcomed national rules, at least with respect to certain matters.[56]

[55] 47 U.S.C. § 271(c)(2)(B)(ii).

[56] For example, the Georgia and Colorado Commissions support national technical standards for interconnection and collocation, although they generally disfavor detailed standards. Georgia Commission comments at 2; Colorado Commission comments at 2-4. The Illinois Commission, which has aggressively sought to open opportunities for local telephone competition, asserts that minimum national rules are important in developing competitive local tele-

58. A broad range of parties urge the Commission to adopt minimum requirements that would permit states to impose additional, pro-competitive requirements that are consistent with the 1996 Act to address local or state-specific circumstances. We agree generally that many of the rules we adopt should establish non-exhaustive requirements, and that states may impose additional pro-competitive requirements that are consistent with the purposes and terms of the 1996 Act, including our regulations established pursuant to section 251.[57] We also anticipate that the rules we adopt regarding interconnection, services, and access to unbundled elements will evolve to accommodate developments in technology and competitive circumstances, and that we will continue to draw on state experience in applying our rules and in addressing new or additional issues. We recognize that it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry. We cannot anticipate all of the changes that will occur as a result of technological advancements, competitive developments, and practical experience, particularly at the state level. Therefore, ongoing review of our rules is inevitable. Moreover, we conclude that arbitrated agreements must permit parties to incorporate changes to our national rules, or to applicable state rules as such changes may be effective, without abrogating the entire contract. This will ensure that parties, regardless of when they enter into arbitrated agreements, will be able to take advantage of all applicable Commission and state rules as they evolve.

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phone service, although it urges the Commission to permit states to implement and enforce additional rules that are consistent with the national rules. Illinois Commission comments at 9-10. The North Dakota Commission has expressed a need for specific national guidance to enable the commission to carry out its obligations under the Act. North Dakota Commission comments at 1-2.

[57] In contrast, we conclude that the 1996 Act limits the obligations states may impose on non-incumbent carriers. *See infra*, Section XI.C.

59. Some parties contend that even minimum requirements may impede the ability of state commissions to take varying approaches to address particular circumstances or conditions. We agree with the contention that, although there are different market conditions from one area to another, such distinct areas do not necessarily replicate state boundaries.[58] For example, virtually all states include both more densely-populated areas and sparsely populated rural areas, and all include both business and residential areas. Although each state is unique in many respects, demographic and other differences among states do not suggest that national rules are inappropriate. Moreover, even though it may not be appropriate to impose identical requirements on carriers with different network technologies, our rules are intended to accommodate such differences.[59] Some parties have argued that explicit national standards will delay the emergence of local telephone competition, but none has offered persuasive evidence to substantiate that claim, and new entrants overwhelmingly favor strong national rules. We conclude, for the reasons set forth above, that some national rules will enhance opportunities for local competition, and we have chosen to adopt national rules where necessary to establish the minimum requirements for a nationwide pro-competitive policy framework.

60. We disagree with those parties that claim we are trying to impose a uniformity that Congress did not intend. Variations among interconnection agreements will

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[58] AT&T comments at 12.

[59] *See infra*, Section IV.E. (concluding that successful interconnection or access to an unbundled element at a particular point in the network creates a rebuttable presumption that such interconnection or access is technically feasible at networks that employ *substantially similar facilities*). We agree with parties, such as the Ohio Consumers' Counsel, that physical networks are not designed on a state-by-state basis. Ohio Consumers' Counsel comments at 4.

exist, because parties may negotiate their own terms, states may impose additional requirements that differ from state to state, and some terms are beyond the scope of this Report and Order. We conclude, however, that establishing certain rights that are available, through arbitration, to all requesting carriers, will help advise parties of their minimum rights and obligations, and will help speed the negotiation process. In effect, the Commission's rules will provide a national baseline for terms and conditions for all arbitrated agreements. Our rules also may tend to serve as a useful guide for negotiations by setting forth minimum requirements that will apply to parties if they are unable to reach agreement. This is consistent with the broad delegation of authority that Congress gave the Commission to implement the requirements set forth in section 251.

61. We also believe that national rules will assist smaller carriers that seek to provide competitive local service. As noted above, national rules will greatly reduce the need for small carriers to expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996 Act. This is particularly true with respect to discrete geographic markets that include areas in more than one state.[60] We agree with the Small Business Administration that national rules will reduce delay and lower transaction costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities.[61] In addition, even a small provider may wish to enter more than one market, and national rules will create economies of scale for entry into multiple markets. We reject the position advocated by some parties

[60] Approximately 17 Personal Communications Service (PCS) providers have Basic Service Areas/Metropolitan Statistical Areas, for example, that cross state lines.

[61] SBA comments at 3-4.

that we should not adopt national rules because such rules will be particularly burdensome for small or rural incumbent LECs.[62] We note, however, that section 251(f) provides relief from some of our rules.

62. We recognize the concern of many state commissions that the Commission not undermine or reverse existing state efforts to foster local competition. We believe that Congress did not intend for us needlessly to disrupt the pro-competitive actions some states already have taken that are both consistent with the 1996 Act and our rules implementing section 251.[63] We believe our rules will in many cases be consistent with pro-competitive actions already taken by states, and in fact, many of the rules we adopt are based directly on existing state commission actions. We also intend to continue to reflect states' experiences as we revise our rules. We also recognize, however, that in at least some instances existing state requirements will not be consistent with the statute and our implementing rules.[64] It will be necessary in those instances for the subject states to amend their rules and alter their decisions to conform to our rules. In our judgment, national rules are highly desirable to achieve Congress's goal of a pro-competitive national policy framework for the telecommunications industry.

B. Suggested Approaches for FCC Rules

1. Comments

63. Parties propose a variety of approaches that the Commission could take in establishing rules for interconnection, network unbundling, and other issues addressed in section 251.[65] Many parties suggest that the

[62] *See, e.g.*, Joint Consumer Advocates reply at 5-6.

[63] 47 U.S.C. § 251(d)(3).

[64] *See infra*, Section II.C.

[65] *See, e.g.*, Cox comments at 22-23; Illinois Commission comments at 9-10; MCI comments at 12; MFS comments at 5-6; SBA

Commission can, and should, establish regulations within six months of the date of enactment of the 1996 Act, and continue on an ongoing basis to revise and amend rules regarding interconnection, service, and access to unbundled network elements.[66] Parties have differing views about why Congress imposed relatively short frames for action by states and the FCC.[67] Some parties suggest that the Commission take a largely "hands off" approach initially, but that it set more specific rules if and when such rules are needed.[68] IXCs, state commissions, incumbent LECs and others agree that, in setting national rules, the Commission should learn from and build upon the experiences of the states.[69]

64. Some state commissions and incumbent LECs recommend that the FCC establish general, broad principles rather than detailed requirements.[70] Several parties favor a "preferred outcomes" approach similar to the one

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comments at 5; Attorneys General reply at 3; California Commission reply at 10-11; Minnesota Ind. Coalition reply at 3-4; National Association of the Deaf reply at 1-3.

[66] MCI reply at 5; Sprint reply at 11.

[67] *See, e.g.*, DoJ coments at 13-15 (the short time frame in which to establish rules evidences Congress's desire to bring about change quickly, which could only occur through a single set of rules, rather than through many iterations); *contra, e.g.*, SBC comments at 10 (the short time frames for seeking arbitration and for state commission review of agreements reflect Congress's desire to bring about change more quickly than the pace that the regulatory process historically has achieved).

[68] Alliance for Public Technology comments at 8-10; U S West comments at 3-4, Illinois Commission comments at 9-10.

[69] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 11-13; MCI comments at 12; Sprint comments at 6-7.

[70] Citizens Utilities comments at 3; Guam Telephone Authority comments at 5; Lincoln Tel. comments at 1, 3; District of Columbia Commission comments at 11-12.

adopted in California.[71] Under that approach, the FCC would establish acceptable or "preferred" outcomes, but parties would have the opportunity to justify deviation from those outcomes.[72] The California Commission argues that we should establish a range of guidelines that are detailed enough to be easy to implement by states that have not yet developed rules for competition, but flexible enough to allow states to continue their pro-competitive efforts without disruption.[73] At least one party, however, asserts that a "preferred outcomes" approach is not sufficient to provide incumbent LECs with an incentive to bargain in good faith.[74]

65. Some state commissions recommend that, if the FCC does establish explicit requirements, states should be allowed to impose different requirements. For example, the Illinois Commission urges the FCC to adopt a process by which states may seek a waiver from the national regulations, upon a showing of need.[75] The Ohio and Florida Commissions recommend that the FCC adopt explicit requirements that states could choose to adopt, but that states would have the option of developing their own requirements.[76] Under the proposal recommended by the Ohio Commission, existing state regulations that are consistent with the 1996 Act would be "grandfathered."[77]

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[71] *See, e.g.*, GTE comments at 12-14; PacTel comments at 1-3; Washington Commission comments at 1-2; ALTS comments at 2-4; Teleport comments at 14-17; Texas Public Utility Counsel reply at 2; Minnesota Ind. Coalition reply at 8.

[72] ALTS comments at 2-4.

[73] California Commission reply at 4-7.

[74] Comcast reply at 5.

[75] Illinois Commission comments at 13; *accord* AT&T comments at 11; ACTA comments at 2-4.

[76] Florida Commission comments at 2-3; Ohio Commission comments at 4-5; *accord* NYNEX reply at 4.

[77] Ohio Commission comments at 4-5; *accord* NARUC comments at 6-7.

In addition, if a state failed to adopt any rules regarding competitive entry into local markets within a specified time, the FCC rules would be binding.[78]

2. Discussion

66. We intend to adopt minimum requirements in this proceeding; states may impose additional pro-competitive requirements that are consistent with the Act and our rules. We decline to adopt a "preferred outcomes" approach, because such an approach would fail to establish explicit national standards for arbitration, and would fail to provide sufficient guidance to the parties' options in negotiations. To the extent that parties advocate "preferred outcomes" from which the parties could deviate in arbitrated agreements, we reject such a proposal, because we conclude that it would not provide the benefits conferred by establishing "default" requirements. To the extent that commenters advocate a regulatory approach that would require parties to justify a negotiated result different from the preferred outcomes, we believe that such an approach would impose greater constraints on voluntarily negotiated agreements than the 1996 Act permits. Under the 1996 Act, parties may freely negotiate any terms without justifying deviation from "preferred outcomes." [79] The only restriction on such negotiated agreements is that they must be deemed by the state commission to be nondiscriminatory and consistent with the public interest, under the standards set forth in section 252(e)(2)(A). In response to the Illinois Commission's suggestion that we adopt a process by which states may seek waivers of our rules, we note that Commission rules already provide for waiver of our rules under certain circumstances.[80]

[78] Ohio Commission comments at 4-5.

[79] 47 U.S.C. § 252(a) (parties may negotiate and enter into a binding agrement without regard to standards set forth in sections 251(b) and (c)).

[80] 47 C.F.R. § 1.3.

We decline to adopt a special waiver process in this proceeding.

67. We intend our rules to give guidance to the parties regarding their rights and obligations under section 251. The specificity of our rules varies with respect to different issues; in some cases, we identify broad principles and leave to the states the determination of what specific requirements are necessary to satisfy those principles. In other cases, we find that local telephone competition will be better served by establishing specific requirements. In each of the sections below, we discuss the basis for adopting particular national principles or rules.

68. We also believe that we should periodically review and amend our rules to take into account experiences of carriers and states, technological changes, and market developments. The actions we take here are fully responsive to Congress's mandate that we complete all actions necessary to establish regulations to implement the requirements of section 251 by August 8, 1996.[81] We nevertheless retain authority to refine or augment our rules, or to follow a different course, after developing some practical experience with the rules adopted herein. It is beyond doubt that the Commission has ongoing rulemaking authority. For example, section 4(i) provides that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions." [82] Section 4(j) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch and to the ends of justice." [83] We agree with Sprint, the Illi-

[81] 47 U.S.C. § 251(d)(1).

[82] 47 U.S.C. § 154(i).

[83] 47 U.S.C. § 154(j). Section 11 of the 1996 Act also directs the Commission to review and modify its rules on an ongoing basis. 47 U.S.C. § 161.

nois Commission, and other parties that we should address in this rulemaking the most important issues, and continue to refine our rules on an ongoing basis to address additional or unanticipated issues, and especially to learn from the decisions and experiences of the states.[84] We also reject the argument of Margaretville Telephone Company that the 1996 Act constitutes an unconstitutional taking because it seeks to deprive incumbent LECs of their "reasonable, investment-backed expectation to hold competitive advantages over new market entrants." [85]

C. Legal Authority of the Commission to Establish Rules Applicable to Intrastate Aspects of Interconnection, Services, and Unbundled Network Elements

1. Background

69. In the NPRM, we tentatively concluded that Congress intended sections 251 and 252 to apply, and that our rules should apply, to both interstate and intrastate aspects of interconnection, services, and access to network elements.[86] We stated in the NPRM that it would seem to make little sense, in terms of economics or technology, to distinguish between interstate and intrastate components for purposes of sections 251 and 252.[87] We also believed

[84] Sprint comments at vi, 6-7; Illinois Commission comments at 9-10. Although various parties have encouraged us to address issues that are beyond those identified in the NPRM, we will address only those topics identified in the NPRM, or that are a clear and logical outgrowth from issues specifically identified in the NPRM. *See, e.g.*, Unicom comments at 1-2 (urging the Commission to extend to IXCs the rules it adopts for LECs regarding collocation, interconnection, and unbundling); TCI comments at 15-17 (asking Commission to clarify the extent to which municipalities have control over rights-of-way under section 253).

[85] Margaretville Tel. comments at 1-4.

[86] NPRM at para. 37.

[87] NPRM at para. 37.

that such a distinction would appear to be inconsistent with Congress's desire to establish a national policy framework for interconnection and other issues critical to achieving local competition. We sought comment on these tentative conclusions.

70. We further tentatively concluded in the NPRM that section 2(b) of the 1934 Act does not require a contrary conclusion.[88] Section 2(b) states that except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." [89] We noted in the NPRM that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions.[90] For example, rates charged to end users for local exchange service have traditionally been subject to state authority, and will continue to be.

2. Comments

71. The parties disagree about the extent to which the FCC has authority to establish regulations pursuant to sections 251 and 252. A majority of commenters that address the issue contend that sections 251 and 252 apply to both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements.[91] Other commenters contend, however, that

[88] NPRM at para. 39.

[89] 47 U.S.C. § 152(b).

[90] NPRM at para. 40.

[91] *See, e.g.*, ACTA comments at 4; ALTS comments at 6; ACSI coments at 5; Arch comments at 5; Bell Atlantic comments at 7-8 (section 251 addresses matters of a "predominantly intrastate na-

sections 251 and 252 apply only to intrastate aspects of interconnection, services, and access to unbundled network elements.[92] None of the commenters appears to claim that section 251 addresses exclusively interstate matters. As discussed below, many parties, including BOCs and state commisssions, contend that the FCC's role under sections 251 and 252 is quite limited.[93]

72. The IXCs and other potential competitors in local exchange markets generally assert that the 1996 Act expressly authorizes, and even obligates, the Commission to establish regulations regarding interstate and intrastate aspects of interconnection, service, and access to unbundled network elements. For example, MCI contends that, "[b]ecause the technical feasibility and cost of providing a particular arrangement do not depend on whether the requesting carrier uses that arrangement to provide interstate or intrastate services," it would make no sense to interpret section 251 to include a jurisdictional distinction between interstate and intrastate aspects of interconnection that does not appear on the face of that provision.[94] Several parties assert that sections 251 and 252 alter traditional jurisdictional boundaries by giving states some authority over interstate matters that they previously did not have, and by giving the FCC some new authority over

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ture"); BellSouth comments at 8; Cable & Wireless comments at 11; CompTel comments at 15; Florida Commission comments at 7; GCI comments at 4; GSA/DoD comments at 6; GTE comments at 3; Jones Intercable comments at 10; MCI comments at 7-8; Sprint comments at 7; TCI comments at 12; Texas Commission comments at 5; NTIA reply at 6 n.15; NCTA reply at 2-7.

[92] NARUC comments at 9-10; New York Commission comments at 10-11; U S West comments at 10-11.

[93] Bell Atlantic comments at 7-8; GTE comments at 3; PacTel comments at 11.

[94] MCI comments at 7, 8 (it is highly unlikely that interconnection arrangements will be used exclusively for jurisdictional-specific traffic).

intrastate matters.[95] Other parties assert that section 251 clearly applies to intrastate aspects of interconnection, services, and access to unbundled elements, and that, as a basic principle of administrative law, to the extent that section 251 addresses intrastate matters, the FCC has authority to adopt implementing regulations.[96]

73. Parties point to other provisions in the 1996 Act to show that the traditional jurisdictional division of authority between states and the FCC does not apply with respect to sections 251 and 252. MCI contends that section 253, by addressing federal preemption of both interstate and intrastate barriers to competition, makes it clear that the jurisdictional division of responsibility is inapplicable.[97] Parties also point to the fact that the Commission must in some circumstances assume the state commission's responsibilities as evidence of a shift in jurisdictional authority.[98] Jones Intercable asserts that sections 251 and 252 of the 1996 Act make distinctions among classes of entities (telecommunications carriers, LECs, and incumbent LECs), rather than between interstate and intrastate service.[99]

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[95] Illinois Commission comments at 3-5, 15; Sprint comments at 5; CompTel reply at 5; Rural Tel. Coalition reply at 3.

[96] MCI reply at 36-37; Vanguard reply at 4 (*citing Time Warner v. FCC*, 56 F.3d 151, 174-76 (D.C. Cir. 1995) for the proposition that agencies are empowered to interpret their organic statutes, through rules and other mechanisms, to govern the behavior of parties regulated under those statutes).

[97] MCI comments at 7-8; *accord* Sprint comments at 4; CompTel comments at 15; TCI reply at 6.

[98] *See, e.g.*, ACTA comments at 4; New Jersey Cable Ass'n, *et al.* reply at 18-19; TCI reply at 6.

[99] Jones Intercable comments at 10; *see also* Time Warner comments at 7; Cable & Wireless comments at 11-12 (sections 251 and 252 apply to all telecommunications serviecs, and the definitions of "telecommunications," "telecommunications service," and telecommunications carrier" are defined without reference to jurisdictional boundaries); New Jersey Cable Ass'n, *et al.* reply at

74. AT&T contends that, by requiring the Commission to "complete all actions necessary to establish regulations to implement the requirements of this Section," section 251(d)(1) requires the Commission to establish minimum national standards for interconnection, unbundling, pricing, resale, and related requirements.[100] AT&T states that the 1996 Act was created pursuant to the settled rule that federal agency regulations preempt any inconsistent state policies unless the underlying federal statute otherwise provides.[101] It interprets section 251(d)(3) to mean that any Commission regulation that reasonably implements section 251 bars state enforcement of any inconsistent state regulations, without regard to whether the preemptive provisions of section 253 would also apply. According to AT&T, the only limitation on the Commission's preemptive powers is that it may not preclude the enforcement of state access and interconnection requirements that are consistent with the 1996 Act and the FCC's implementing regulations.[102] AT&T maintains that this interpretation is consistent with the fact that section 252(c)(1) requires state commissions to ensure that nonvoluntary agreements are consistent with the Commission's regulations under section 251(d).[103]

18-19; GSA/DoD reply at 7 (Congress did not intend to expand traditional interstate and intrastate jurisdictional distinctions); Competitive Policy Insitue reply at 10.

[100] AT&T comments at 4 (*quoting* § 251(d)(1) of the Act).

[101] AT&T comments at 4-5 (*citing Fidelity Federal Savings and Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 152-154 (1982); *City of New York v. FCC*, 467 U.S. 57, 64 (1988); *Oklahoma Natural Gas v. FERC*, 28 F.3d 1281, 1283 (D.C. Cir. 1994)).

[102] AT&T comments at 5 and nn.3-4; *accord* Cable & Wireless comments at 11 (in section 253, Congress made clear that the Commission has authority to preempt any state requirement that creates a barrier to either interstate or intrastate services, or that is inconsistent with the 1996 Act); MCI comments at 7-8; Sprint comments at 4.

[103] AT&T comments at 5-6.

75. AT&T further contends that section 2(b) of the Act does not limit the Commission's authority to promulgate rules under section 251, because section 251 "gives the FCC explicit authority to prescribe and enforce preemptive rules that are necessary to achieve the Act's purpose of developing local services competition."[104] Sprint, Comcast, and other parties assert that Congress intended section 251 to give the Commission authority over both interstate and intrastate aspects of interconnection, notwithstanding the fact that it left section 2(b) unamended.[105] For example, Comcast contends that section 253(a) authorizes the Commission to preempt any state or local requirement that prohibits or has the effect of prohibiting any interstate or intrastate telecommunications service.[106] In view of the explicit grants of authority in sections 251 and 253, Comcast asserts that it was unnecessary to amend section 2(b). Cable & Wireless contends that the fact that section 251(d)(1) provides that the FCC "shall" in some cases preempt state regulations is evidence that Congress did not believe it was required to amend section 2(b) before delegating intrastate authority to the FCC.[107] AT&T asserts that the fact that prior versions of the legislation amended section 2(b) to except Part II of Title II of the Act is not dispositive; when the language was taken out, it was not listed as a substantive change, but treated as a "minor drafting" or "clerical"

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[104] AT&T comments at 6 (section 2(b) cannot be read to nullify section 2(a) and sections 201 to 205) (*citing California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994); *PUC of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1990); *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984); *Louisiana PSC v. FCC*, 476 U.S. 355, 375-76 n.4 (1986)).

[105] Sprint comments at 7; Comcast reply at 2-3; NCTA reply at 5-6.

[106] Comcast reply at 2-3.

[107] Cable & Wireless reply at 9-10.

change.[108] AT&T asserts that this was an appropriate characterization, because section 2(b) would not have had any effect in any event.

76. Several parties contend that the Act makes clear that states are required to apply FCC rules established under section 251. For example, sections 252(c)(1) and (f)(2) explicitly require the states to apply the FCC's regulations.[109] In addition, section 261(c) provides that state requirements must be "not inconsistent" with Part II of Title II, including the Commission's regulations thereunder.[110] Thus, the parties contend that these provisions constitute express federal preemption, and that section 601(c), which provides that any premptive effect of the new law must be express, does not establish limits to the FCC's authority to establish regulations under section 251.[111]

77. Sprint states that other provisions of the 1996 Act:

> subordinate state actions and policies with respect to intrastate service to those of the Commission, *e.g.*, sections 253 (entry barriers), 254(f) (universay service), 258 (PIC change procedures), and 276 (payphone services). If Congress had intended the jurisdictional split in section 2(b) to remain unaffected by the 1996 Act, all of these very specific subordinations of state policy to federal policy would be nullities, and much of the 1996 Act would make no sense at all.[112]

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[108] AT&T reply at 4 n.5 (citing Joint Explanatory Statement at 113).

[109] AT&T reply at 2.

[110] Jones Intercable comments at 11-12; MCI reply at 7; MFS reply at 7; New Jersey Cable Ass'n, *et al.* reply at 23.

[111] New Jersey Cable Ass'n, *et al.* reply at 23; Jones Intercable reply at 15.

[112] Sprint comments at 7.

Sprint contends that the only way to give meaning to both section 2(b) and the above-referenced provisions is to conclude that the section 2(b) distinctions remain in effect for "retail" services offered to end users, but that the detailed scheme for intercarrier relationships set forth in Part II of Title II supersedes section2(b).[113] MCI concurs, and adds that this interpretation is consistent with settled principles of statutory construction that the specific prevails over the general, and the later-enacted provision prevails over the earlier-enacted provision.[114]

78. Some state commissions and some other commenters assert that section 251, as well as other provisions of the 1996 Act, support the interpretation that Congress intended states to have a primary role in setting requirements for intrastate interconnection. For example, these parties assert that section 251(d)(3) is evidence that Congress intended to permit states to implement their own access and interconnection regulations, and that this statutory language requires the FCC to fashion its regulations to avoid precluding state interconnection policy or rules.[115] They note that section 251(d)(3) requires consistency with the Act, but does not mandate consistency with the FCC's regulations.[116] SNET asserts that, if Congress intended to preclude state discretion to interpret section 251 requirements, it would have preempted all

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[113] Sprint comments at 7-8.

[114] MCI comments at 8 (*citing Stendor Enterprises Ltd. v. Armtex, Inc.*, 947 F.2d 727, 732 (4th Cir. 1991); *Redhouse v. C.I.R.*, 728 F.2d 1249, 1253 (9th Cir. 1984); *Mesa Petroleum Co. v. FERC*, 688 F.2d 1014, 1016 (5th Cir. 1982)).

[115] Maryland Commission comments at 22; Ohio Commission comments at 16-17 (*citing* Joint Explanatory Statement at 1, 119); *accord, e.g.*, Bogue, Kansas comments at 4; Connecticut Commission comments at 7; NARUC comments at 14; PacTel comments at 14; Pennsylvania Commission comments at 7-9.

[116] Maryland Commission comments at 22; Washington Commission comments at 6-7.

state policies addressing those requirements, rather than just policies that substantially prevent implementation of the statute.[117] Some parties also point out that section 251(d)(3) is entitled "Preservation of state access regulations," and argue that the stated purpose of that provision is to preserve or "grandfather" most, if not all, state access and interconnection regulations.[118] They also allege that section 601(c) of the Act demonstrates that Congress intended to preserve states' authority over intrastate matters, and that any preemption finding would have to be based on an express provision.[119] Bogue, Kansas states that section 256(c) also makes clear that nothing in that section expands or iimits the Commission's authority prior to the enactment of the 1996 Act.[120] The Oregon Commission argues that section 261 also permits states to impose requirements, as long as those requirements are not inconsistent with the 1996 Act.[121]

79. Some state commissions and incumbent LECs contend that the Commission's authority to establish regulations that may preempt state requirements is limited to those instances where section 251 expressly provides for Commission action.[122] Some parties also contend that,

[117] SNET reply at 1-2; *accord* Colorado Commission comments at 5-9.

[118] Ohio Commission reply at 3; BellSouth reply at 5.

[119] *See, e.g.*, District of Columbia Commission comments at 6; Maryland Commission comments at 21; NARUC comments at 13; Ohio Commission comments at 15-16; Wyoming Commission comments at 10; BellSouth reply at 5-6.

[120] Bogue, Kansas comments at 5.

[121] Oregon Commission comments at 13-14; *accord* Washington Commission comments at 9; Rural Tel. Coalition reply at 4.

[122] Rural Tel. Coalition comments at 5 (Commission authority should be limited to establishing number portability requirements, regulations for limitations on resale, minimum unbundling requirements, rules for administering the North American Numbering Plan, enforcing existing *access* and interconnection requirements, and determining whether to treat additional carriers as incumbent LECs); *see also* District of Columbia Commission comments at 8-10; NARUC comments at 14-15; New York Commission comments at 2-3, 8.

because section 252(e)(5) specifically requires the FCC to assume the responsibilities of the state commission if the state commission fails to act under section 252, the FCC's role under section 252 is limited to that specific delegation of authority.[123]

80. These parties also reject the claim that section 251 takes precedence over section 2(b).[124] They note that section 2(b) was not amended by the 1996 Act, although prior version of the bills would have done so.[125] Moreover, parties claim that, in other instances, Congress did specifically amend section 2(b) to give the Commission authority over intrastate aspects of specified matters.[126] Bell Atlantic asserts that the failure to amend section 2(b) is "fatal to the notice's proposed federalization of intrastate interconnection and other intrastate matters."[127] The Ohio Commission expressly rejects the suggestion in the NPRM

[123] *See, e.g.*, NARUC comments at 15; New York Commission comments at 9; PacTel comments at 13.

[124] *See, e.g.*, Bell Atlantic comments at 4; Connecticut Commission comments at 5; Oregon Commission comments at 12; Indiana Commission Staff comments at 4-5; Iowa Commission comments at 6.

[125] *See, e.g.*, Maryland Commission comments at 16 (*citing* Conf. Rep. No. 104-230 at 78 and H.R. 1555 Rep. No. 104-204 at 53); *accord* NARUC comments at 10 (*citing Russello v. U.S.*, 464 U.S. 16 (1989)); Oregon Commission comments at 15.

[126] California Commission comments at 11; Connecticut Commisison comments at 7 (*citing* the Omnibus Budget Reconciliation Act of 1993 as an example of congressional intent to alter jurisdictional authority); Maryland Commission comments at 20; Ohio Commission comment sat 14-15; BellSouth reply at 4.

[127] Bell Atlantic comments at 7.

that there was no need to amend section 2(b) because sections 251 and 252 do not affect end user rates.[128]

81. Some parties further contend that preemption must be express, not implied, and that no such express statement was made in section 251.[129] Parties also assert that, by comparison, the Act is "quite clear in preempting states where it intended to do so."[130] For example, the New York Commission asserts that, in certain circumstances, section 254(f) expressly directs states to act in a manner that is "not inconsistent" with FCC rules.[131] NARUC asserts that there is a "well established presumption against finding preemption of State law in areas traditionally regulated by the States" that weighs against an interpretation that the FCC has broad regulatory authority to establish rules governing local exchange markets.[132]

82. To support their claim that, in 1934, Congress established a dual regulatory system, and that the FCC's

[128] Ohio Commission comments at 15 (the 1993 amendments to section 2(b) expressly reserved to states responsibility for wholesale rates in general).

[129] *See, e.g.*, NARUC comments at 12 (*citing Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 175 (1985)); Arizona Commission comments at 16; Bogue, Kansas comments at 3 (*citing Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); New York Commission comments at 6 (*citing Washington Market v. Hoffman*, 101 U.S. 112 (1879)); Municipal Utilities reply at 5 (FCC may not preempt state regulations that are consistent with the Act).

[130] Bogue, Kansas comments at 4 n.3 (section 251(e) gives FCC "exclusive jurisdiction" over some aspects of Number Administration); Maryland Commission comments at 15; Ohio Commission comments at 12, 16.

[131] New York Commission comments at 8; *see also* NARUC comments at 12 (contrasting section 276, which explicitly provides that Commission regulations shall preempt inconsistent state requirements).

[132] NARUC comments at 12 (*quoting California v. ARC America Corp.*, 490 U.S. 91, 101 (1989)).

jurisdiction is limited to interstate issues, except where otherwise expressly provided, these parties cite to the Supreme Court's decision in *Louisiana Public Service Comm'n v. FCC*.[133] The Maryland Commission contends that *Louisiana PSC* is controlling here, because: (1) the dual regulatory system was not eliminated by the 1996 Act; (2) the FCC may not rely upon the broad congressional intent to promote competition as a delegation of authority over intrastate issues; and (3) the 1996 Act does not embody a federal regulatory scheme that is so pervasive as to infer that Congress left no room for states to supplement it.[134] PacTel claims that, because section 251 was created after the decision in *Louisiana PSC*, Congress was aware that, if it wanted section 251 to override section 2(b), it would have to do so in an unambiguous manner. Consequentially, because Congress did not amend section 2(b) or otherwise expressly limit its effect, section 2(b) takes precedence over section 251 to the extent the provisions conflict.[135] Several parties offer additional bases for finding that the *Louisiana PSC* decision controls the scope of the Commission's authority under section 251.[136]

[133] 476 U.S. 335 (1986) (*Louisiana PSC*). In that case, the Supreme Court held that section 220 of the 1934 Act, which directs the FCC to set depreciation regulations, did not give the FCC authority to preempt inconsistent state depreciation regulations for intrastate ratemaking purposes.

[134] Maryland Commission comments at 17-18 (*citing Fidelity Savings and Loan Assn. v de la Cuesta*, 458 U.S. 141, 153 (1982)); *accord* Ohio Commission comments at 11; Oregon Commission comments at 13; Washington Commission comments at 9-10.

[135] PacTel comments at 14-15.

[136] The Maryland Commission further asserts that compliance with both federal and state regulation as envisioned by the 1996 Act is not a physical impossibility that would support a claim of implied preemption. Maryland Commission comments at 18 (*citing Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)); *accord* Washington Commission comments at 10. The Ohio Commission avers that it is possible for the FCC to promulgate

3. Discussion

83. We conclude that, in enacting sections 251, 252, and 253, Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act.[137] That Act generally gave jurisdiction over interstate matters to the FCC and over intrastate matters to the states. The 1996 Act alters this framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues.[138] Indeed, many provisions of the 1996 Act are designed to open telecommunications markets to

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rules that apply to interstate services only. Ohio Commission comments at 13. Several states also reject the idea that section 251 squarely addresses, and therefore controls, the jurisdictional issue, because there is "no mention of intrastate services or preemption of states' authority over such matters in Section 251." Ohio Commission comments at 12; Maryland Commission comments at 23; *accord* Bell Atlantic comments at 6. Pacific Telesis asserts that sections 251 and 2(b) may be read as internally consistent, and that, under rules of statutory construction, they must be so interpreted. PacTel comments at 12-13 (*citing Washington Market Co. v. Hoffman*, 101 U.S. 112 (1879)). Bell Atlantic states that the Supreme Court held in *Louisiana PSC* that the rule of statutory construction that the specific takes precedence over the general does not apply where two provisions "address 'different subject[s]' and therefore 'are not general or specific with respect to each other.'" Bell Atlantic comments at 6 (*quoting Louisiana PSC*, 476 U.S. at 376 n.5); GTE reply at 5.

[137] According to Senator Pressler, "Progress is being stymied by a morass of regulatory barriers which balkanize the telecommunications industry into protective enclaves. We need to design a *national policy framework*—a new regulatory paradigm for telecommunications—which accommodates and accelerates technological change and innovation." 141 Cong. Rec. S7881-2, S7886 (June 7, 1995) (emphasis added). According to Representative Fields, "[Congress] is decompartmentalizing segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly, giving consumers choice . . .", 142 Cong. Rec. H1149 (Feb. 1, 1996).

[138] For example, section 253(a) suggests that states may establish regulations regarding interstate as well as intrastate matters.

all potential service providers, without distinction between interstate and intrastate services.

84. For the reasons set forth below, we hold that section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements. We also hold that the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251. Similarly, we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole. As we indicated in the NPRM, it would make little sense in terms of economics or technology to distinguish between interstate and intrastate components for purposes of sections 251 and 252.[139]

85. We view sections 251 and 252 as cretating parallel jurisdiction for the FCC and the states. These sections require the FCC to establish implementing rules to govern interconnection, resale of services, access to unbundled network elements, and other matters, and direct the states to follow the Act and those rules in arbitrating and approving arbitrated agreements under sections 251 and 252. Among other things, the fact that the Commission is required to assume the state commission's responsibilities if the state commission fails to carry out its section

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[139] We believe that this interpretation is the most reasonable one in light of our expectation that marketing and product offerings by telecommunications carriers will diminish or eliminate the significance of interstate-intrastate distinctions.

252 responsibilities [140] gives rise to the inevitable inference that both the states and the FCC are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under sections 251 and 252.

86. The only other possible interpretations would be that: (1) sections 251 and 252 address only intertate aspects of interconnection, services, and access to unbundled elements; (2) the provisions address only tbe intrastate aspects of those issues; or (3) the FCC's role is to establish rules for interstate aspects, and the states' role is to arbitrate and approve agreements on intrastate aspects. As explained below, none of these interpretations withstands examination. Accordingly, we conclude that sections 251 and 252 address both interstate and intrastate aspects of interconnection services and access to unbundled elements.

87. Some parties have argued that our authority under section 251 is limited by section 2(b). Ordinarily, in light of section 2(b), we would interpret a provision of the Communications Act as addressing only the interstate jurisdiction unless the provision (as well as section 2(b) itself) provided otherwise. That interpretation is contradicted in this case, however, by strong evidence in the statute that the local competition provisions of the 1996 Act are directed to both intrastate and interstate matters. For example, section 251(c)(2), the interconnection requirement, requires LECs to provide interconnection "for the transmission and routing of *telephone exchange service* and exchange access." [141] Because telephone exchange service is a local, intrastate service, section 251(c)(2) plainly addresses intrastate service, but it also addresses interstate exchange access. In addition, we note that in section 253," the statute explicitly authorizes the Com-

[140] *See* 47 U.S.C. § 252(e)(5).

[141] 47 U.S.C. § 251(c)(2).

mission to preempt intrastate and interstate barriers to entry.[142]

88. More genrally, if these sections are read to address only interstate services, the grant of substantial responsibilities to the states under section 252 is incongruous. A statute designed to develop a *national* policy framework to promote local competition cannot reasonably be read to reduce significantly the FCC's traditional jurisdiction over interstate matters by delegating enforcement responsibilities to the states, unless Congress intended also to implement its national policies by enhancing our authority to encompass rulemaking authority over intrastate interconnection matters.[143]

89. Some parties argue that section 251 addresses solely intrastate matters. We do not find this argument persuasive.[144] Under this narrow view, section 251(c)(6) requiring incumbent LECs to offer physical collocation would apply only to equipment used for intrastate services, while new entrants would be limited to the use of virtual collocation for equipment used in the provision of interstate services, pursuant to the decision in *Bell Atlantic*.[145] Such an interpretation would force new en-

[142] 47 U.S.C. § 253(a).

[143] The legislative history is replete with statements indicating that Congress meant to address intrastate local exchange competition. For instance, Senator Lott stated that "[i]n addressing *local and long distance issues*, creating an open access and sound interconnection policy was the key objective . . ." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added). Representative Markey noted that "we take down the barriers of *local and long distance* and cable company, satellite, computer software entry into any business they want to get in." 142 Cong. Rec. H1151 (Feb. 1, 1996) (emphasis added).

[144] *See, e.g.*, New York Commission comments at 5-8.

[145] *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic*) (holding that the Commission did not have authority to require physical collocation for the provision of interstate services).

trants to use diffeernt methods of collocation based on the jurisdictional nature of the traffic involved, and would thereby greatly increase new entrants' costs. Moreover, such an interpretation would fail to give effect to Congress's intent to enacting section 251(c)(6) to reverse the result reached in *Bell Atlantic*.[146]

90. Another factor that makes clear that sections 251 and 252 did not address exclusively intrastate matters is the provision in section 251(g), 'Continued Enforcement of Exchange Access and Interconnection Requirements." That section provides that BOCs must follow the Commission's "equal access and nondiscriminatory interconnection restrictions (including receipt of compensation)" until they are explicitly superseded by Commission regulations after the date of enactment of the 1996 Act. This provision refers to existing Commission rules governing interstate matters, and therefore it contradicts the argument that section 251 addresses intrastate matters exclusively.

91. Nor does the savings clause of section 251(i) require us to conclude that sections 251 and 252 address only intrastate issues. Section 251(i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." This subsection merely affirms that the Commission's preexisting authority under section 201 continues to apply for purely interstate activities. It does not act as a limitation on the agency's authority under section 251.

92. As to the third possible interpretation, the FCC's role is to establish rules for only the interstate aspects of interconnection, and the states' role is to arbitrate and

[146] The language in the House bill which closely matches the language that appears in section 251(c)(6), noted that a provision requiring physical collocation was necessary "because a recent court decision indicates that the Commission lacks authority under the Communications Act to order physical collocation." H.R. Rep. No. 204, pt. I, 104th Cong., 1st Sess., at 73 (1995).

approve only the intrastate aspects of interconnection agreements. No commenters support this position, and we find that it would be inconsistent with the 1996 Act to read into sections 251 and 252 such a distinction. The statute explicitly contemplates that the states are to comply with the Commission's rules, and the Commission is required to assume the state commission's responsibilities if the state commission fails to act to carry out its section 252 responsibilities.[147] Thus, we believe the only logical conclusion is that the Commission and the states have parallel jurisdiction. We conclude, therefore, that these sections can only logically be read to address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements, and thus to grant the Commission authority to establish regulations under 251, binding on both carriers and states, for both interstate and intrastate aspects.

93. Section 2(b) of the Act does not require a different conclusion. Section 2(b) provides that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .".[148] As stated above, however, we have found that sections 251 and 252 do apply to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."[149] In enacting sections 251 and 252 after section 2(b), and squarely addressing therein the issue of interstate and intrastate jurisdiction, we find that Congress intended for sections 251 and 252 to take precedence over any contrary implications based on section

[147] 47 U.S.C. § 252(e)(5).

[148] 47 U.S.C. § 152(b).

[149] 47 U.S.C. § 152(b).

2(b).[150] We note also, that in enacting the 1996 Act, there are other instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b). For instance, section 251(e)(1) provides that "[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[151] Section 253 directs the FCC to preempt state regulations that prohibit the ability to provide intrastate services. Section 276(b) directs the Commission to "establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call."[152] Section 276(d) provides that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."[153] None of these provisions is specifically excepted from section 2(b), yet *all* of them explicitly give the FCC jurisdiction over intrastate matters. Thus, we believe that the lack of an explicit exception in section 2(b) should not be read to require an interpretation that the Commission's jurisdiction under sections 251 and 252 is limited to interstate services. A contrary holding would nullify several explicit grants of authority to the FCC, noted above, and would render parts of the statute meaningless.[154]

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[150] *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it as a commonplace of statutory construction that the specific governs the general"); *see also* 2 J. Sutherland, Statutory Construction § 22.34 (6th ed.) (where amended and original sections of a statute cannot be harmonized, the new provisions should prevail as the latest declaration of legislative will); *American Airlines, Inc. v. Remis Industries, Inc.*, 494 F.2d 196, 200 (2nd Cir. 1974).

[151] 47 U.S.C. § 251(e)(1).

[152] 47 U.S.C. § 276(b).

[153] 47 U.S.C. § 276(d).

[154] *See* Sprint comments at 7.

94. Some parties find significance in the fact that earlier drafts of the legislation would have amended section 2(b) to make an exception for Part II of Title II, including section 251, but the enacted version did not include that exception. These parties argue that this change in drafting demonstrates an intention by Congress that the limitations of section 2(b) remain fully in force with regard to sections 251 and 252. We find this argument unpersuasive.

95. Parties that attach significance to the omission of the proposed amendemnt of section 2(b) rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. This rule of statutory construction has been rejected, however, when changes from one draft to another are not explained.[155] In this instance, the only statement from Congress regarding the meaning of the omission of the section 2(b) amendment appears in the Joint Explanatory Statement of the Conference Report. According to the Joint Explanatory Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."[156] Because the Joint Explanatory Statement did not address the removal of the section 2(b) amendment from the final bill, the logical inference is that Congress regarded the change as an inconsequential modification rather than a significant alteration. Moreover, it seems implausible that, by selecting the final version, Congress intended a radical alteration of the Commission's authority under section 251, given the total lack

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[155] *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *Rastelli v. Warden*, 782 F.2d 17, 23 (2d Cir. 1986); *Drummond Coal v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984).

[156] Joint Explanatory Statement at 113.

of legislative history to that effect. We conclude that elimination of the proposed amendment of section 2(b) was a nonsubstantive change because, as AT&T contends, such amendment was unnecessary in light of the grants of authority under sections 251 and 252, and would have had no practical effect.[157]

96. Some parties have argued that, to the extent that sections 251 and 252 address intrastate matters, the Commission's rulemaking authority under those sections is limited to those instances where Commission action regarding intrastate matters is specifically mandated, such as number administration. We disagree. There is no language limiting the Commission's authority to establish rules under section 251. To the contrary, section 251(d)(1) affirmatively requires Commission rules, stating that "the Commission *shall* complete *all* actions necessary to implement the requirements of *this section*."[158] Pursuant to sections 4(i), 201(b), and 303(r) of the Act, the Commission generally has rulemaking authority to implement all provisions of the Communications Act. Courts have held that the Commission, pursuant to its general rulemaking authority, has "expansive" rather than limited powers.[159] Further, where Congress has expressly delegated to the Commission rulemaking responsibility with respect to a particular matter, such delegation constitutes "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations . . .".[160] Indeed, to read these provisions otherwise would negate the requirement that states ensure that arbitrated agreements are consistent with the Com-

[157] AT&T reply at 4 n.5.

[158] 47 U.S.C. § 251(d)(1) (emphasis added).

[159] *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943); *see also Federal Coommunications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978).

[160] *Fulani v. FCC*, 49 F.3d 904, 909 (2d Cir. 1995) (cite omitted); *see also Kay v. FCC*, 443 F.2d 638, 640 (D.C.Cir. 1970).

mission's rules. Thus, the explicit rulemaking requirements pointed out by some of the parties is best read as giving the Commission more jurisdiction than usual, not less. We believe thtat the delegation of authority set forth in section 251(d)(1) is "expansive" and not limited. We therefore reject assertions that the Commission has authority to establish regulations regarding intrastate matters only with respect to certain provisions of section 251, such as number administration.

97. Moreover, thhe Court in *Louisiana PSC* does not suggest a different result. The reasoning in *Louisiana PSC* applies to the dual regulatory system of the 1934 Act. As set forth above, however, in sections 251-253, Congress amended the dual regulatory system that the Court addressed in *Louisiana PSC*. As a result, preemption in this cas is governed by the usual rule, also recognized in *Louisiana PSC*, that an agency, acting within the scope of its delegated authority, may preempt inconsistent state regulation.[161] As discussed above, Congress here has expressed an intent that our rules apply to intrastate interconnection, services, and access to network elements. Therefore, *Louisiana PSC* does not foreclose our adoption of regulations under section 251 to govern intrastate matters.

98. Parties have raised other arguments suggesting that the Commission lacks authority over intrastate matters. We are not persuaded by the argument that sections 256(c) and 261, as well as section 601(c) of the 1996 Act, evince an intent by Congress to preserve states' exclusive authority over intrastate matters. In fact, section 261 supports the finding that the Commission may establish regulations regarding intrastate aspects of interconnection, services and access to unbundled elements that the states may not supersede. Section 261(b) *generally* permits states to enforce regulations prescribed prior to the date of enactment of the 1996 Act, and to prescribe

[161] *Louisiana PSC*, 476 U.S. at 368.

regulations after such date, if such regulations are not inconsistent with the provisions of Part II of Title II.[162] Section 261(c) *specifically* provides that nothing in Part II of Title II "precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part *or the Commission's regulations to implement this part.*" [163] We conclude that state access and interconnection obligations referenced in section 251(d)(3) fall within the scope of section 261(c). Section 261(c), as the more specific provision, controls over section 261(b) for matters that fall within its scope.[164] We note, too, that sectin 261(c) encompasses all state requirements. It is not limited to requirements that were prescribed prior to the enactment of the 1996 Act. By providing that state requirements for *intrastate* services must be consistent with the Commission's regulations, section 261(c) buttresses our conclusion that the Commission may establish regulations regarding intrastate aspects of interconnection, services, and access to unbundled elements.

99. Section 601 of the 1996 Act and section 256 also are consistent with our conclusion. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." [165] We conclude that section 251(d)(1), which requires the Commission to "establish regulations to implement the requirements of this

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[162] 47 U.S.C. § 261(b).

[163] 47 U.S.C. § 261(c) (emphasis added).

[164] *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

[165] 47 U.S.C. § 6$1(c)(1).

section," [166] and section 261(c), were expressly intended to modify federal and state law and jurisdictional authority.

100. Section 256, entitled "Coordination for Interconnectivity," has no direct bearing on the issue of the Commission's authority under section 251, because it provides only that "[n]othing *in this section* shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996." [167] That provision is relevant, however, as a contrast to section 251, which does not contain a similar statement that the scope of the Commission's authority is unchanged by section 251.[168]

101. We further conclude that the Commission's regulations under section 251 are binding on the states, even with respect to intrastate issues. Section 252 provides that the agreements state commissions arbitrate must comply with the Commission's regulations established pursuant to section 251. In addition, section 253 requires the Commission to preempt state or local regulations or requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [169] As discussed above, section 261(c) provides further support for the conclusion that states are bound by the regulations the Commission establishes under section 251.

102. We disagree with claims that section 251(d)(3) "grandfathers" existing state regulations that are consistent

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[166] 47 U.S.C. § 251(d)(1).

[167] 47 U.S.C. § 256(c) (emphasis added).

[168] *Russello v. United States*, 464 U.S. 16, 23 (1983); *Cramer v. Internal Revenue Service*, 64 F.3d 1406, 1412 (9th Cir. 1995) (where Congress includes a provision in one section of statute but omits it in another section of the same Act, it should not be implied where it is excluded).

[169] 47 U.S.C. § 253(a).

with the 1996 Act, and that such state regulations need not comply with the Commission's implementing regulations. Section 251(d)(3) only specifies that the Commission may not preclude enforcement of state access and interconnection requirements that are consistent with section 251, and that do not substantially prevent implementation of the requirements of section 251 or the purposes of Part II of Title II. In this Report and Order, we set forth only such rules that we believe are necessary to implement fully section 251 and the purposes of Part II of Title II. Thus, state regulations that are inconsistent with our rules may "substantially prevent implementation of the requirements of this section and the purposes of [Part II of Title II]." [170]

103. We are not persuaded by arguments that, because other provisions of the 1996 Act specifically require states to comply with the Commission's regulations, the absence of such requirement in section 251(d)(3) indicates that Congress did not intend such compliance. Section 251(d)(3) permits states to prescribe and to enforce access and interconnection requirements only to the extent that such requirements "are consistent with the requirements" of section 251 [171] and do not "substantially prevent implementation" of the requirements of section 251 and the purposes of Part II of Title II.[172] The Commission is required to establish regulations to "implement the requirements of the section." [173] Theremore, in order to be consistent with the requirements of section 251 and not "substantially prevent" implementation of section 251 or Part II of Title II, state requirements must be consistent with the FCC's implementing regulations.[174]

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[170] 47 U.S.C. § 251(d)(3)(C).

[171] 47 U.S.C. § 251(d)(3)(B).

[172] 47 U.S.C. § 251(d)(3)(C).

[173] 47 U.S.C. § 251(d)(1).

[174] We recognize that, in some instances, whether particular state requirements are consistent with the Commission's rules may need to be considered on a case-by-case basis.

D. Commission's Legal Authority and the Adoption of National Pricing Rules

1. Background

104. In the NPRM, we sought comment on our tentative conclusion that sections 251(c)(2), (c)(3), and (c)(6) establish the Commission's legal authority under section 251(d) to adopt pricing rules to ensure that the rates, terms, and conditions for interconnection, access to unbundled network elements, and collocation are just, reasonable, and nondiscriminatory.[175] We also sought comment on our tentative conclusion that sections 251(b)(5) and 251(c)(4) establish our authority to define "wholesale rates" for purposes of resale, and "reciprocal compensation arrangements" for purposes of transport and termination of telecommunications services.[176] In addition, we asked parties to comment on our tentative conclusion that the Commission's statutory duty to implement the pricing requirements of section 251, as elaborated in section 252, requires that we establish pricing rules interpreting and further explaining the provisions of section 252(d). The states would then apply these rules in establishing rates pursuant to arbitrations and in reviewing BOC statements of generally available terms and conditions.[177]

105. We further sought comment on our tentative conclusion that national pricing rules would likely reduce or eliminate inconsistent state regulatory requirements, increase the predictability of rates, and facilitate negotiation, arbitration, and review of agreements between incumbent LECs and competitive providers.[178] We also

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[175] NPRM at para. 117.

[176] *Id.* at 118.

[177] *Id.* at para. 118.

[178] *Id.* at para. 119.

sought comment on the potential consequences of the Commission not establishing specific pricing rules.[179]

2. Comments

106. *Legal Authority*. The Department of Justice, GSA/DoD, many potential new entrants, and a few state commissions maintain that the Act gives the Commission a critical role in establishing national pricing rules to ensure that the rates for interconection, access to unbundled network elements, and collocation are just, reasonable, and nondiscriminatory.[180] They contend that section 251(d)(1) specifically directs the Commission, without limitation, to develop pricing rules governing transport and termination, interconection, the provisioning of unbundled network elements, and resale.[181] These parties maintain that nothing in sections 251 and 252 expressly precludes the Commission from establishing pricing rules for the states to apply.[182] Therefore, they argue that the

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[179] *Id.*

[180] *See e.g.*, DoJ comments at 24-25; GSA/DoD comments at 8, reply at 6; Teleport comments at 44; ALTS comments at 33; GST comments at 25-26; Hyperion comments at 19; ACSI comments at 53, reply at 18-19; MFS comments at 49; MCI comments at 59; Sprint comments at 42; Cox comments at 22; TCI comments at 6; Time Warner comments at 45; WinStar comments at 28, reply at 6-7; Comcast reply at 12; AT&T reply at 5; Kentucky Commission comments at 3; Wyoming Commission comments at 27; *see also* NCTA comments at 8-9; Texas Public Utility Counsel comments at 15; Jones Intercable comments at 10-12, reply at 10-13 (arguing that the Commission should adopt national binding pricing rules); New Jersey Cable Ass'n, *et al.* reply at 6-9, 11 (arguing that the pricing rules adopted by the Commission should be binding); Vanguard reply at 4-5.

[181] DoJ comments at 24-25; Sprint comments at 42; Teleport comments at 44; GST comments at 25-26.

[182] *Id; see also* Citizens Utilities comments at 15-16.

broad grant of authority under section 251(d)(1) includes authority to establish pricing rules.[183]

107. On the other hand, most state commissions, BOCs, and incumbent LEC trade associations contend that nothing in the 1996 Act specifically authorizes the Commission to adopt pricing rules.[184] A group of state commissions and NARUC contend that the Commission's authority to implement the requirements of section 251 is limited to the express activities assigned to the Commission in that section, such as prescribing regulations for resale and numbering portability, determining unbundled network elements, and establishing a North American Numbering Plan Administrator (NANPA) and a cost recovery mechanism for the administrators' operations.[185]

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[183] DoJ comments at 24-25; Sprint comments at 42; Teleport ocmments at 44; GST comments at 25-26.

[184] *See, e.g.*, Wisconsin Commission comments at 4; Ohio Commission comments at 36-39; Florida Commission comments at 24-25; Colorado Commission comments at 10; Pennsylvania Commission comments at 10-11, 26-27; Washington Commission comments at 23; Maryland Commission comments at 11; South Carolina Commission comments at 2; Minnesota Commission reply at 2-3; Nebraska Rural Development Commission comments at 1; Virginia Commission Staff comments at 2-3; Mass. Commission comments at 4; Idaho Commission comments at 10; New York Commission comments at 10, 23, reply at 4-5; Georgia Commission comments at 2-3, 7; Arizona Commission comments at 18; District of Columbia Commission comments at 24-28 (stating that the Commission has authority to adopt non-binding guidelines that would be helpful to states); Missouri Commission comments at 7-8; Texas Commission comments at 21; Alabama Commission comments at 6, 9, 22; Maine Commission, *et al.* comments at 2-4; Illinois Commission comments at 8, 41; Indiana Commission comments at 4-5; New Hampshire Commission *et al.* reply at 3; NARUC comments at 16-20, reply at 3-5; Pacific comments at 13, 63, SBC comments at 51-53, 70-71; BellSouth comments at 48-49, reply at 31-32; Rural Tel. Coalition comments at 24; USTA comments at 4-5; GTE comments at 59, reply at 3-5; SNET comments at 28; TDS comments at 17 n.14.

[185] NARUC comment sat 14-15; Maine Commission, *et al.* comments at 2-4; *see also* GTE comments at 6-7.

The New York Commission contends that the 1996 Act is unambiguous in reserving intrastate pricing to the states under section 252(d), and that any Commission regulations would apply only to states that do not act to open local markets to competition and to those provisions in section 251 that require specific Commission rules.[186] The Ohio Commission asserts that section 251(d)(3) explicitly provides that the Commission shall not preclude states from enforcing or implementing the requirements of section 251, as long as the state's policy is consistent with section 251.[187]

108. The Illinois Commission states that section 252(d) governs pricing standards for interconnection and network element charges, transport and termination of traffic, and wholesale services.[188] It argues that each provision expressly establishes standards under which state commissions are to determine prices, without reference to any Commission rulemaking.[189] The Illinois Commission further contends that in establishing standards for state commissions to apply during arbitration under section 252(b), subsections 252(c)(1) and 252(c)(2) distinguish between section 251 and the Commission's regulations prescribed thereunder, and the pricing standards set forth in section 252(d), which do not reference any Commission regulations.[190] The Illinois Commission infers from these subsections that Congress did not intend for the Commission to exercise broad rulemaking authority under sections 251 and 252.[191] Other state commissions

[186] New York Commission comments at 2-3; *see also* Pennsylvania Commission comments at 10-11, 26-27; Virginia Commission Staff comments at 3.

[187] Ohio Commission comments at 36-39.

[188] Illinois Commission comments at 7.

[189] *Id.*

[190] *Id.* at 8, 41.

[191] *Id.*

similarly argue that the general language of section 251(c)(2)(D) and the specific grant of authority to states under section 252(d) to price interconnection elements reveal Congress' intent to confer responsibility over pricing on the states.[192]

109. *National Standards.* The Department of Justice, the SBA, and most of the IXCs, CAPs, and cable companies addressing this issue agree that the Commission should establish national pricing rules for interconnection and unbundled elements under 252(d)(1) for the reasons stated in the NPRM.[193] Citizens Utilities, NEXTLINK, and WinStar also support the Commission's tentativte conclusion that national pricing rules should be adopted to guide the states in facilitating the negotiation and arbitration process.[194] The majority of consumer organizations urge the Commission to establish uniform, national rules and argue that inconsistent and unpredictable state rules would inhibit or delay the efforts of new entrants to obtain interconnection arrangements with incumbent LECs

[192] Colorado Commission comments at 10; Pennsylvania Commission comments at 10-11, 26-27; Virginia Commission comments at 2-3; Mass. Commission comments at 4; Arizona Commission comments at 18.

[193] *See, e.g.*, DoJ comments at 25-26; SBA comments at 4; LDDS comments at 19-20, 58; AT&T comments at 45; LCI comments at 3, 12; MCI comments at 59; Sprint comments at 42, reply at 5-11; CompTel comments at 19-22; Vartec, *et al.* comments at 10 (national pricing standards for database); ALTS comments at 33; Teleport comments at 45-46, reply at 32; Hyperion comments at 3, reply at 5-6; ASCI comments at 51-53; Intermedia comments at 14; MFS comments at 52-54, 58, 64; Cable & Wireless comments at 32; Cox comments at 12, 22, reply at 5, 13-16; Comcast comments at 44; Continental comments at 16; TCI comments at 22-24, reply at 1-3; Jones Intercable comments at 2-4, reply at 3, 9; Time Warner comments at 47, reply at 2, 7-9; *see also* Vanguard reply at 3, 7-9.

[194] *See, e.g.*, Citizens Utilities comments at 15-16; NEXTLINK comments at 24-25; WinStar comments at 28; *see also* CompTel comments at 19-20.

and undermine their ability to raise capital in the financial markets.[195] Several state commissions also support the adoption of national rules. For example, the Kentucky Commission contends that national pricing rules would facilitate competitive entry,[196] and the North Dakota Commission argues that such national rules would provide significant assistance to those states that have not opened their local markets to cempetition.[197]

110. The RBOCs, with the exception of Ameritech, generally oppose the adoption of national pricing rules on legal and policy grounds.[198] The majority of states also express opposition to national pricing rules and argue that section 251(d)(3) reserves to the states the details of local service competition.[199] Other state commissions ad-

[195] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 3-4, 11, 29-32; SDN Users Ass'n comments at 2; CFA/CU comments at 26; Competition Policy Institute comments at 9-10, reply at 10; *see also* ITIC comments at 3-5; TRACER comments at 37, reply at 6; NTIA reply at 15-16.

[196] *See, e.g.*, Kentucky Commission comments at 4; *see also* Texas Public Utility Counsel comments at 15.

[197] *See, e.g.*, North Dakota Commission comments at 1-2.

[198] *See, e.g.*, NYNEX comments at 40-41; SBC comments at 48, 50, reply at 29, 33; PacTel comments at 2, 8, 64, and 65, reply at 23; BellSouth comments at 49, 55, reply at 33; Ameritech comments at 59 (favoring national pricing principles that allow incumbent LECs to recover all costs); *see also* Cincinnati Bell comments at 20 (supporting FCC rules, but arguing that rules should only be general and for the purpose of guiding states in the negotiation and arbitration process).

[199] *See, e.g.*, Ohio Commission comments at 39-40; Colorado Commission comments at 28, reply at 4-6; Wyoming Commission comments at 20, 27-29; Minnesota reply at 2-3; Maryland Commission comments at 12; New York Commission comments at 11-12, reply at 9-10; Georgia Commission comments at 7, reply at 1; Indiana Commission comments at 2, 21; Alaska Commission comments at 4; Missouri Commission comments at 8; Oregon Commission comments at 30; Alabama Commission comments at 20-21; North Carolina Commission comments at 10; Maine Commission, *et al.* comments at 2-3; California Commission comments at 11-12,

vocate that the Commission should adopt either preferred outcomes for interconnection that narrow the range of issues in arbitration and negotiation,[200] or general nonbinding guidelines that recognize the rights of states to adopt their own pricing standards.[201] For instance, the Illinois Commission contends that, if the Commission finds that it has authority to establish pricing rules to govern the states, it could determine that rates for interconnection and unbundled network elements are to be based upon forward-looking costs rather than historical costs, and leave all other details to the states. In addition, the Illinois Commission argues that any pricing standards that the Commission prescribes should be focused narrowly on those services addressed in section 252(d).[202] The Iowa Commission maintains that the Commission's rules may be explicit only to the extent that they prohibit state policies that are inconsistent with section 251.[203] Some incumbent LEC trade associations suggest that the Commission adopt only broad guidelines and minimum pricing requirements.[204] NADO,

reply at 18; Arizona Commission comments at 19; Connecticut Commission comments at 9-10; Washington Commission reply at 2; New Hampshire Commission, *et al.* reply at 2-3; Mississippi Commission comments at 13; Pennsylvania Commission comments at 26; NARUC comments at 23, 24, reply at 12-13; Florida Commission comments at 25; *see also* Ohio Consumers' Counsel comments at 21, 27; MECA comments at 39-41; Municipal Utilities comments at 17-18, reply at 7; Attorneys General, *et al.* reply at 2, 7; Puerto Rico Tel. comments at 5-6; reply at 9-10; Alaska Tel. Ass'n comments at 2.

[200] *See* Washington Commission comments at 2.

[201] *See, e.g.*, Pennsylvania Commission comments at 28; South Carolina Commission comments at 3; Illinois Commission comments at 41, reply at 12-13; Washington Commission comments at 2, 22; *see also* NYNEX comments at 42.

[202] *See* Illinois Commission comments at 41-43.

[203] *See* Iowa Commission comments at 5.

[204] *See, e.g.*, NECA comments at 6; USTA comments at 37; *see also* George Washington Urban League comments at 2; Alliance for Public Technology comments at 9-11, reply at 1; ALLTEL comments at 4-7, reply at summary.

Joint Consumer Advocates, and the Rural Tel. Coalition oppose the adoption of any national pricing rules on the ground that such a regime would not allow for flexibility and innovation.[205] The Rural Tel. Coalition further asserts that if the Commission insists on prescribing pricing standards for all states, it must take into account the myriad of different classes of customers, geographic chacteristics, population densities, and technologies.[206]

3. Discussion

111. In adopting sections 251 and 252, we conclude that Congress envisioned complementary and significant roles for the Commission and the states with respect to the rates for section 251 services, interconnection, and access to unbundled elements.[207] We interpret the Commission's role under section 251 as ensuring that rates are just, reasonable, and nondiscriminatory: in doing so, we believe it to be within our discretion to adopt national pricing rules in order to ensure that rates will be just, reasonable and nondiscriminatory. The Commission is also responsible for ensuring that interconnection, collocation, access to unbundled elements, resale services, and transport and termination of telecommunications are reasonably available to new entrants.[208] The states' role under section 252(c) is to establish specific rates when the parties cannot agree, consistent with the regulations prescribed by the Commission under sections 251(d)(1) and 252(d).

112. While we recognize that sections 201 and 202 create a very different regulatory regime from that envisioned by sections 251 and 252, we observe that Con-

[205] *See* NADO, *et al.* at 4, 6; Joint Consumer Advocates reply at 9-10; Rural Tel. Coalition comments at 19, reply at 13-14.

[206] Rural Tel. Coalition comments at 19, reply at 14.

[207] *See infra*, Sections VII and VIII.

[208] For a further discussion of specific pricing rules, *see infra*, Section VII.

gress used terms in section 251, such as the requirement that rates, terms, and conditions be "just, reasonable, and nondiscriminatory," that are very similar to language in sections 201 and 202. This lends additional support for the proposition that Congress intended to give us authority to adopt rules regarding the justness and reasonableness of rates pursuant to section 251, comparable in some respects to the authority Congress gave us pursuant to sections 201 and 202.

113. We believe that national pricing rules are a critical component of the interconnection regime set out in sections 251 and 252. Congress intended these sections to promote opportunities for local competition, and directed us to establish regulations to ensure that rates under this regime would be economically efficient. This, in turn, should reduce potential entrants' capital costs, and should facilitate entry by all types of service providers, including small entities.[209] Further, we believe that national rules will help states review and arbitrate contested agreements in a timely fashion. From August to November and beyond, states will be carrying the tremendous burden of setting specific rates for interconnection and network elements, for resale, and for transport and termination when parties bring these issues before them for arbitration. As discussed in more detail below, we are setting forth default proxies for states to use if they are unable to set these rates using the necessary cost studies within the statutory time frame. After that, both we and the states will need to review the level of competition, revise our rules as necessary, and reconcile arbitrated interconection arrangements to those revisions on a going-forward basis.

114. We believe that national rules should reduce the parties' uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings, which will reduce regulatory burdens for all parties including small incumbent LECs and small entities.

[209] *See* Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

A national regime should also help to ensure consistent federal court decisions on review of specific state orders under sections 251 and 252.[210] In addition, uner the national pricing rules that we adopt for interconnection and unbundled network elements, states will retain the flexibility to consider local technological, environmental, regulatory, and economic conditions. Failure to adopt national pricing rules, on the other hand, could lead to widely disparate state policies that could delay the consummation of interconnection arrangements and otherwise hinder the development of local competition. Lack of national rules could also provide opportunities for incumbent LECs to inhibit or delay the interconnection efforts of new competitors, and create great uncertainty for the industry, capital markets, regulators, and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital. In sum, we believe that the pricing of interconnection, unbundled elements, resale, and transport and termination of telecommunications is important to ensure that opportunities to compete are available to new entrants.

115. As we observed in the NPRM,[211] section 251 explicitly sets forth certain requirements regarding rates for interconnection, access to unbundled elements, and related offerings. Sections 251(c)(2) and (c)(3) require that incumbent LECs' "*rates*, terms, and conditions" for interconnection and unbundled network elements be "just, reasonable, and nondiscriminatory in accordance with . . . the requirements of sections 251 and 252."[212] Section 251(c)(4) requires that incumbent LECs' offer "for resale at wholesale *rates* any telecommunications service that the carrier provides at retail to subscribers who are not

[210] *See* 47 U.S.C. § 252(e)(6).

[211] NPRM at para. 117.

[212] 47 U.S.C. §§ 251(c)(2) and (c)(3) (emphasis added).

telecommunications carriers," without unreasonable conditions or limitations.[213] Section 251(c)(6) provides that all LECs must provide physical collocation of equipment, "on *rates*, terms, and conditions that are just, reasonable, and nondiscriminatory."[214] Section 251(b)(5) requires that all LECs "establish reciprocal *compensation* arrangements for the transport and termination of telecommunications."[215] Section 251(d)(1) further expressly directs the Commission, without limitation, to "complete all actions necessary to implement the requirements of[section 251]."[216]

116. Section 252 generally sets forth the procedures that state commissions, incumbent LECs, and new entrants must follow to implement the requirements of section 251 and establish specific interconnection arrangements. Section 252(c)(1) provides that "in resolving by arbitration . . . any open issues and imposing conditions upon the parties to the agreement, a State commission shall . . . ensure that such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section* 251."[217]

117. We conclude that, under section 251(d)(1), Congress granted us broad authority to complete all actions necessary to implement the requirements of section 251, including actions necessary to ensure that rates for interconnection, access to unbundled elements, and collocation are "just, reasonable, and nondiscriminatory."[218] We also determine that the statue grants us the authority to define reasonable "wholesale rates" for purposes of services to be

[213] 47 U.S.C. § 251(c)(4) (emphasis added).

[214] 47 U.S.C. § 251(c)(6) (emphasis added).

[215] 47 U.S.C. § 251(b)(5) (emphasis added).

[216] 47 U.S.C. § 251(d)(1).

[217] 47 U.S.C. § 252(c)(1) (emphasis added).

[218] *See* 47 U.S.C. §§ 251(c)(2), (c)(3), and (c)(6).

resold, and "reciprocal compensation" for purposes of transport and termination of telecommunications.[219] The argument advanced by the New York Commission, NARUC, and others that the Commission's implementing authority under section 251(d)(1) is limited to those provisions in section 251 that mandate specific Commission rules, such as prescribing regulations for number portability, unbundling, and resale, reads into section 251(d)(1) limiting language that the section does not contain. Congress did not confine the Commission's rulemaking authority to only those matters identified in sections 251(b)(2), 251(c)(4)(B), and 251(d)(2), and there is no basis for inferring such an implicit limitation. A narrow reading of section 251(d)(1), as proposed by the New York Commission, NARUC, and others, would require the Commission to neglect its statutory duty to implement the provisions of section 251 and to promote rapid competitive entry into local telephone markets.

118. We also reject the arguments raised by several state commissions that the language in section 252(c) indicates Congress's intent for the Commission to have little or no authority with respect to pricing of interconnection, access to unbundled elements, and collocation. We do not believe that the statutory directive that state commissions establish rates according to section 252(d) restricts our authority under section 251(d)(1). States must comply with both the statutory standards under section 252(d) *and* the regulations prescribed by the Commission pursuant to section 251 when arbitrating rate disputes or when reviewing BOC statements of generally available terms. Section 252(c) enumerates three requirements that states must follow in arbitrating issues.[220] These requirements are not set forth in the alternative; rather, states must comply with all three.

[219] *See* 47 U.S.C. §§ 251(b)(5) and (c)(4).

[220] *See* 47 U.S.C. §§ 252(c)(1), (c)(2), and (c)(3).

119. We further reject the argument that section 251(d)(3) restricts the Commission's authority to establish national pricing regulations. Section 251(d)(3) provides that the Commission shall not preclude the enforcement of any regulation, order, or policy of a stat ecommission that, *inter alia,* is consistent with the requirements of section 251 and does not substantially prevent implementation of the requirements of section 251. This subsection, as discussed in section II.C., *supra,* is intended to allow states to adopt regulations that are not inconsistent with the Commission's rules; it does not address state policies that are inconsistent with the pricing rules established by the Commission.

120. We also address the impact of our rules on small incumbent LECs. For example, Rural Tel. Coalition argues that rigid rules, based on the properties of large urban LECs, cannot blindly be applied to small and rural LECs.[221] As discussed above, however, we believe that states will retain sufficient flexibility under our rules to consider local technological, environmental, regulatory, and economic conditions. We also note that section 251(f) may provide relief to certain small carriers.[222]

E. Authority to Take Enforcement Action

1. Background

121. The Commission's implementation of section 251 must be given full effect in arbitrated agreements and incorporated into all such agreements. There is judicial review of such arbitrated agreements, and one issue surely will be the adherence of these agreements to our rules. The Commission will have the opportunity to participate, upon request by a party or a state or by submitting an *amicus* filing, in the arbitration or the judicial review thereof. To clarify our potential role, we consider the

[221] Rural Tel. Coalition reply at 14.

[222] *See* 47 U.S.C. § 251(f).

extent of the Commission's authority to review and enforce agreements entered into pursuant to section 252. Section 252(e)(6) provides that, in "any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." [223]

122. In the NPRM, we sought comment on the relationship between section 251 and 252 and the Commission's existing authority under section 208(a), which allows any person to file a complaint with the Commission regarding "anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof . . ." [224] We asked whether section 208 gives the Commission authority over complaints alleging violations of requirements set forth in sections 251 or 252. We also sought comment on the relationship between sections 251 and 252 and any other applicable Commission enforcement authority. We further sought comment on how we might increase the effectiveness of the Commission's enforcement mechanisms. Specifically, we asked for comment on how private rights of action might be used under the Act, and the Commission's role in speeding dispute resolution in forums used by private parties.

2. Comments

123. The majority of commenters agree that the Commission's section 208 complaint authority extends to the acts or omissions of common carriers in contravention of sections 251 and 252.[225] TCI further asserts that the Com-

[223] 47 U.S.C. § 252(e)(6).

[224] *See* 47 U.S.C. § 208; *see also* NPRM at para. 41.

[225] *See, e.g.*, ALTS comments at 7; AT&T comments at 10-11; BellSouth comments at 9; CompTel comments at 103; Florida Commission comments at 10-11; Ind. Cable & Telecomm. Ass'n reply at

mission retains authority to issue declaratory rulings pursuant to the Administrative Procedure Act, 5 U.S.C. 554(e), and to initiate investigations pursuant to section 403 of the Communications Act.[226] Several state commissions argue, however, that allowing parties to file section 208 complaints would be inconsistent with the states' preeminent role under section 251 and 252, at least in some circumstances. For example, the New York Commission contends that, to the extent that sections 251 and 252 apply to both interstate and intrastate services, the FCC ouly has authority to hear complaints regarding interstate communications.[227] The Illinois Commission asserts that a section 208 remedy would be appropriate only after an agreemnt is implemented, and only to the extent the complaint does not allege that the agreement violates standards set forth in section 251 and 252.[228]

3. Discussion

124. Consistent with our decision in *Telephone Number Portability* [229] and the views of most commenters, we conclude that parties have several options for seeking relief if they believe that a carrier has violated the standards under section 2.51 or 2.52. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court.[230] Federal district courts

4; Jones Intercable comments at 13-14; MCI comments at 7-8; MFS comments at 8-9; Ohio Commission comments at 17; Sprint comments at 8-9; TCI comments at 10; TCC comments at 62.

[226] TCI comments at 10.

[227] New York Commission reply; *see also* Wyoming Commission comments at 15-16.

[228] Illinois Commission comments at 16-18.

[229] *See Number Portability Order*.

[230] Commenters also suggest that the statute's provision for federal district court review of state public utility commission decisions is inconsistent with the 11th Amendment. That issue is not properly

may choose to stay or dismiss proceedings brought pursuant to section 252(e)(6), and refer issues of compliance with the substantive requirements of sections 251 and 252 to the Commission under the primary jurisdiction doctrine.[231] We find, however, that federal court review is not the exclusive remedy regarding state determinations under section 252. The 1996 Act is clear when it intends for a remedy to be exclusive. For example, section 252 (e)(6) provides that, if a state commission fails to act, as described in section 252(e)(5), "the proceeding by the Commission under [section 252(e)(5)] and any judicial review of the Commission's actions *shall be the exclusive remedies* for a State commission's failure to act."[232] In contrast, the succeeding sentence in section 252(e)(6) provides that any party aggrieved by a state commission determination under section 252 "*may* bring an action in an appropriate Federal district court . . . ."[233]

125. The Commission also stands ready to provide guidance to states and other parties regarding the statute and our rules. In addition to the informal consultations that we hope to continue with state commissions, they or other parties may at any time seek a declaratory ruling where necessary to remove uncertainty or eliminate a controversy.[234] Because section 251 is critical to the develop-

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before the Commission since it is the federal courts that will have to determine the scope of their jurisdiction and in any case "regulatory agencies are not free to declare an act of Congress unconstitutional." *See Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987).

[231] *See Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993); *Allnet Comm. Servs. v. National Exchange Carrier Ass'n*, 965 F.2d 1118 (D.C. Cir. 1992); *see also* TCC Comments at 61.

[232] 47 U.S.C. § 252(e)(6) (emphasis added).

[233] *Id.* (emphasis added).

[234] *See* 47 C.F.R. § 1.2 (the Commission, in accordance with section 5(d) of the Administrative Procedures Act, 5 U.S.C. § 554(e), may issue a declaratory ruling terminating a controversy or removing uncertainty).

ment of competitive local markets, we intend to act expeditiously on such requests for declaratory rulings.

126. We further conclude that section 252(e)(6) does not divest the Commission of jurisdiction, in whole or in part, over complaints that a common carrier violated section 251 or 252 of the Act. Section 601(c)(1) of the 1996 Act provides that the 1996 Act "shall not be construed to modify, impair or supersede" existing federal law—which includes the section 208 complaint process—unless expressly so provided."[235] Sections 251 and 252 do not divest the Commission of its section 208 complaint authority.

127. An aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission. Alternatively, a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement. We plan to initiate a proceeding to adopt expedited procedures for resolving complaints filed pursuant to section 208.

128. We note that, in acting on a section 208 complaint, we would not be directly reviewing the state commission's decision, but rather, our review would be strictly limited to determining whether the common carrier's actions or omissions were in contravention of the Communications Act.[236] Thus, consistent with our past decisions in

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[235] 47 U.S.C. § 601(c)(1).

[236] While we would have authority to review such complaints, we note that we might decline, at least in some instances, to impose financial penalties upon a common carrier that is acting pursuant to state requirements or authorization, even if we sustain the allegations in the complaint.

analogous contexts,[237] we conclude that a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review or a section 208 complaint to the Commission againnst a common carrier. Such a person could, as a further alternative, pursuant to section 207, file a complaint against a common carrier with the Commission or in federal district court for the recovery of damages.[238] We are unlikely, in adjudicating a complaint, to examine the consistency of a state decision with sections 251 and 252 if a judicial determination has already been made on the issues before us.[239]

129. Finally, we clarify, as one commenter requested,[240] that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law. In addition, in appropriate circumstances, the Commission could institute an inquiry on its own motion, 47 U.S.C. § 403, initiate a forfeiture proceeding, 47 U.S.C. § 503(b), initiate a cease-and-desist proceeding, 47 U.S.C. § 312(b), or in extreme cases, consider initiating a revocation proceeding for violators with

[237] *See Number Portability Order, supra; Freemon v. AT&T*, 9 FCC Rcd 4032, 4033 (1994) (provision permitting persons aggrieved by violation of prohibition against unauthorized publication of certain communications to "bring a civil action in United States district court or any other court of competent jurisdiction" did not bar a complaint under section 208 of the Communications Act); *see also Policies Governing the Provision of Shared Telecommunications Service*, 3 FCC Rcd 6931 (1988) (the section 208 complaint process is available to resolve any specific problems that might arise regarding shared telecommunications service regulation by a state that impinges upon a federal interest).

[238] *See* 47 U.S.C. § 207.

[239] *Town of Deerfield v. FCC*, 992 F.2d 420, 428-430 (2d Cir. 1993).

[240] *See* MCI comments at 9.

radio licenses, 47 U.S.C. § 312(a), or referring violations to the Department of Justice for possible criminal prosecution under 47 U.S.C. § 501, 502 & 503(a).

F. Regulations of BOC Statements of Generally Available Terms

130. We noted in the NPRM that section 251 and our implementing regulations govern the states' review of BOC statements of generally available terms and conditions,[241] as well as arrangements reached through compulsory arbitration pursuant to section 252(b).[242] We tentatively concluded that we should adopt a single set of standards with which both arbitrated agreements and BOC statements of generally available terms must comply.

131. Only a few commenters addressed this issue, and most concurred with the tentative conclusion that we should apply the same requirements to both arbitrated agreements and BOC statements of generally available terms.[243] The Illinois Commission, for example, asserts that, "[s]ince the generally available terms could be viewed as a baseline against which to craft arbitrated arrangements, it is reasonable to hold both arbitrated agreements and the BOC statements of generally available terms to the same standards."[244] CompTel asserts that, particularly if states require incumbent LECs to tariff the terms and conditions in agreements that are subject to arbitration, there will be few if any distinctions between arbitrated agreements and generally available terms and conditions.[245]

[241] *See* 47 U.S.C. §§ 252(f) and 271(c)(2)(B).

[242] NPRM at para. 36 (*citing* 47 U.S.C. §§ 252(b), (f)).

[243] ACTA comments at 4; Arch comments at 5; BellSouth comments at 7; CompTel comments at 105; Illinois Commission comments at 14; MCI comments at 7; Sprint comments at 8.

[244] Illinois Commission comments at 14.

[245] Comptel comments at 105.

132. We hereby find that our tentative conclusion that we should apply a single set of standards to both arbitrated agreements and BOC statements of generally available terms is consistent with both the text and purpose of the 1996 Act. BOC statements of generally available terms are relevant where a BOC seeks to provide in-region interLATA service, and the BOC has not negotiated or arbitrated an agreement. Therefore, such statements are to some extent a substitute for an agreemnt for interconnection, services, or access to unbundled elements. We also find no basis in the statute for establishing different requirements for arbitrated agreements and BOC statements of generally available terms. Moreover, a single set of requirements will substantially ease the burdens of state commissions and the FCC in reviewing agreements and statements of generally available terms pursuant to sections 252 and 271.

G. States' Role in Fostering Local Competition Under Sections 251 and 252

133. As already referenced, states will play a critical role in promoting local competition, including by taking a key role in the negotiation and arbitration process. We believe the negotiation/arbitration process pursuant to section 252 is likely to proceed as follows. Initially, the requesting carrier and incumbent LEC will seek to negotiate mutually agreeable rates, terms, and conditions governing the competing carrier's interconnection to the incumbent's network, access to the incumbent's unbundled network elements, or the provision of services at wholesale rates for resale by the requesting carrier. Either party may ask the relevant state commission to mediate specific issues to facilitate an agreement during the negotiation process.

134. Because the new entrant's objective is to obtain the services and access to facilities from the incumbent that the entrant needs to compete in the incumbent's market, the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation. Indeed, the entrant has nothing that the incumbent needs to compete with the entrant, and has little to offer the incumbent in a negotiation. Consequently, the 1996 Act provides that, if the parties fail to reach agreement on all issues, either party may seek arbitration before a state commission. The state commission will arbitrate individual issues specified by the parties, or conceivably may be asked to arbitrate the entire agreement. In the event that a state commission must act as arbitrator, it will need to ensure that the arbitrated agreement is consistent with the Commission's rules. In reviewing arbitrated and negotiated agreements, the state commission may ensure that such agreements are consistent with applicable state requirements.

135. Under the statutory scheme in sections 251 and 252, state commissions may be asked by parties to define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services beyond the rules the Commission establishes in this Report and Order. Moreover, the state commissions are responsible for setting specific rates in arbitrated proceedings. For example, state commissions in an arbitration would likely designate the terms and conditions by which the competing carrier receives access to the incumbent's loops. The state commission might arbitrate a description or definition of the loop, the term for which the carrier commits to the purchase of rights to exclusive use of a specific network element, and the provisions under which the competing carrier will order loops from the incumbent and the incumbent will provision an order. The state commission may establish procedures that govern should the incumbent refurbish or replace the element during the agreement period, and the procedures that apply should an end user customer decide to switch from the competing carrier back to the incumbent or a different provider. In addition, the state commission will establish

the rates an incumbent charges for loops, perhaps with volume and term discounts specified, as well as rates that carriers may charge to end users.

136. State commissions will have similar responsibilities with respect to other unbundled network elements such as the switch, interoffice transport, signalling and databases. State commissions may identify network elements to be unbundled, in addition to those elements identified by the Commission, and may identify additional points at which incumbent LECs must provide interconnection, where technically feasible. State commissions are responsible for determining when virtual collocation may be provided instead of physical collocation, pursuant to section 251(c)(6). States also will determine, in accordance with section 251(f)(1), whether and to what extent a rural incumbent LEC is entitled to continued exemption from the requirements of section 251(c) after a telecommunications carrier has made a bona fide request under section 251. Under section 251(f)(2), states will determine whether to grant petitions that may be filed by certain LECs for suspension or modification of the requirements in sections 251(b) or (c).

137. The foregoing is a representative sampling of the role that states will have in steering the course of local competition. State commissions will make critical decisions concerning a host of issues involving rates, terms, and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251. The actions taken by a state will significantly affect the development of local competition in that state. Moreover, actions in one state are likely to influence other states, and to have a substantial impact on steps the FCC takes in developing a pro-competitive national policy framework.

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[from *First Report & Order* pp. 130-133]

D. Access to Network Elements

1. Background

265. In the NPRM, we observed that section 251(c)(3) requires incumbent LECs to provide "access" to network elements "on an unbundled basis."[568] We interpreted these terms to mean that incumbent LECs must provide carriers with the functionality of a particular element, separate from the functionality of other elements, and must charge a separate fee for each element. We sought comment on this interpretation and any alternative interpretations.[569]

2. Comments

266. A number of parties agree with our interpretation that the phrase "access to network elements on an unbundled basis" means that incumbent LECs must provide access to the functionality of different elements on a separate basis, and must charge separate fees.[570] In contrast, PacTel argues that the 1996 Act does not require the provision of an element's functionality, but merely requires incumbent LECs to provide elements in a way that allows carriers to combine them and offer a telecommunications service. PacTel nevertheless acknowledges that agreements will likely allow for the provision of an element's functionality.[571]

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[568] 47 U.S.C. § 251(c)(3).

[569] NPRM at para. 86.

[570] BellSouth comments at 34; MFS comments at 41; Cable & Wireless comments at 26-27; MCI comments at 12-20; Ericsson comments at 4; District of Columbia Commission comments at 22; Nextel comments at 8; USTA comments at 26; Colorado Commission comments at 27; Pennsylvania Commission comments at 24-25; GTE comments at 27; Florida Commission comments at 19; GST comments at 19.

[571] PacTel comments at 44-47.

267. Bell Atlantic and USTA argue that "access" to unbundled elements can only be achieved by interconnecting, under the terms of section 251(c)(2), a requesting carrier's facilities to the facilities of the incumbent LEC at a particular point.[572]

3. Discussion

268. We conclude that we should adopt our proposed interpretation that the terms "access" to network elements "on an unbundled basis" mean that incumbent LECs must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements, for a separate fee. We further conclude that a telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. The specified period may vary depending on the terms of the agreement between the incumbent LEC and the requesting carrier. The ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.[573] We reject PacTel's interpretation of the terms quoted above because it is inconsistent with our definition of the term network element (*i.e.*, an element includes all features and functions embedded in it).

[572] Bell Atlantic comments at 13; USTA comments at 62-63; *see also* GTE comments at 74-79; Letter from Antoinette Cook Bush, Counsel for Ameritech, to William F. Caton, Secretary, FCC, July 10, 1996; *cf.* DoJ comments at 45 (the requirement in section 251(c)(2) that carriers must offer either local exchange or exchange access services does not apply to the carriers offering services using unbundled elements).

[573] We clarify that title to unbundled network elements will not shift to requesting carriers.

Moreover, to the extent that PacTel's argument suggests that the 1996 Act does not require unbundled elements to be provisioned in a way that would make them useful, we find that its statutory interpretation is inconsistent with the statute's goal of providing new entrants with realistic means of competing against incumbents.

269. We further conclude that "access" to an unbundled element refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service. Just as section 251(c)(2) requires "interconnection . . . at any technically feasible point," section 251(c)(3) requires "access . . . at any technically feasible point."[574] We conclude, based on the terms of sections 251(c)(2), 251(c)(3), and 251(c)(6), that an incumbent LEC's duty to provide "access" constitutes a duty to provide a connection to a network element indpendent of any duty imposed by subsection (c)(2). Thus, such "access" must be provided under the rates, terms, and conditions that apply to unbundled elements.

270. Specifically, section 251(c)(6) provides that incumbent LECs must provide "physical collocation of equipment necessary for interconnection *or* access to unbundled network elements."[575] The use of the term "or" in this phrase means that interconnection is different from "access" to unbundled elements. The text of sections 251(c)(2) and (c)(3) leads to the same conclusion. Section 251(c)(2) requires that interconnection be provided for "the transmission and routing of telephone exchange service and exchange access."[576] Section 251(c)(3), in contrast, requires the provision of access to unbundled elements to allow requesting carriers to pro-

[574] 47 U.S.C. §§ 251(c)(2), 251(c)(3).

[575] 47 U.S.C. § 251(c)(6) (emphasis added).

[576] 47 U.S.C. § 251(c)(2).

vide "a telecommunications service." [577] The term "telecommunications service" by definition includes a broader range of services than the terms "telephone exchange service and exchange access." [578] Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection. If we were to conclude that "access" to unbundled elements under subsection (c)(3) could only be achieved by means of interconnection under subsection (c)(2), we would be limiting, in effect, the uses to which unbundled elements may be put, contrary to the plain language of section 251(c)(3) and standard canons of statutory construction.[579]

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[from *First Report & Order* pp. 140-144]

F. Provision of a Telecommunications Service Using Unbundled Network Elements

1. Background

289. Section 251(c)(3) provides that an incumbent LEC must provide access to "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service.[609] In the NPRM, we sought comment on the meaning of this requirement.

2. Comments

290. The Illinois Commission and Texas Public Utility Counsel, as well as a number of potential local competitors, argue that incumbent LECs cannot limit the nature of requests for required elements, restrict the sale of those

[577] 47 U.S.C. § 251(c)(3).

[578] *See* 47 U.S.C. § 153(16), (46), (47).

[579] *See, e.g.*, DoJ comments at 35-47.

[609] 47 U.S.C. § 251(c)(3).

elements or the manner in which carriers use them,[610] impose requirements on the use of unbundled elements, or require the purchase of elements that carriers do not need.[611] The Texas Public Utility Counsel contends that carriers may combine unbundled elements with any technically-compatible equipment.[612] AT&T argues that incumbent LECs should be prohibited from separating elements that are ordered in combination, or from varying the definition of an unbundled element based on the services a carrier seeks to offer (absent the consent of the requesting carrier). AT&T and Comptel also argue that, in order to enable new entrants to offer competing services, incumbent LECs must perform the functions necessary to combine elements, and they must do so in any technically feasible manner requested by a new entrant.[613] According to Comptel, incumbent LECs must provide the operational and back office systems necessary for requesting carriers to purchase and combine network elements, otherwise the new entrants' ability to compete will be impaired.[614] Sprint contends that this provision requires incumbents to offer different facilities and services in con-

[610] Illinois Commission comments at 36-38; CompTel reply at 21; Cable & Wireless reply at 20; LDDS comments at 40 (the statute grants carriers the right to use unbundled elements to offer any telecommunications service); *accord* GCI reply at 11.

[611] LDDS comments at 40; AT&T comments at 27; Cable & Wireless reply at 20; Texas Public Utility Counsel comments at 8-9; *see also* NCTA comments at 40-41 (new entrants must have access to elements that are necessary to provide a telecommunications service).

[612] Texas Public Utility Counsel comments at 8-9.

[613] AT&T comments at 27; CompTel reply at 23-24; *see also* MCI comments at 23.

[614] CompTel comments at 38. Back office systems include the administrative means by which incumbent LECs commercially provision telecommunications services to consumers. Thus, they include the means by which incumbent LECs accept orders for services, respond to requests for repairs, etc.

nection with a particular element, depending on the service a requesting carrier seeks to offer.[615] The Florida Commission argues, however, that if a new entrant needs a particular variation of an element to offer a service, that element should be treated as distinct. This means, for example, that, if a requesting carrier seeks a local loop with a specific kind of conditioning, that loop should be treated as a distinct element from loops with other kinds of conditioning.[616]

291. NYNEX contends that incumbent LECs are not obligated to connect unbundled elements either to each other or to new entrants' facilities, and that the text of section 251(c)(3) requires requesting carriers to do the combining.[617] BellSouth argues that section 251(c)(3) requires requesting carriers to identify network elements with sufficient specificity so that their characteristics and appropriate uses can be defined. BellSouth contends that section 251(c)(3) prohibits carriers from requesting elements to provide cable or information services.[618]

3. Discussion

292. Under section 251(c)(3), incumbent LECs must provide access to "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service.[619] We agree with the Illinois Commission, the Texas Public Utility Counsel, and others that this language bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of

[615] Sprint comments at 30.

[616] Florida Commission comments at 22.

[617] NYNEX reply at 19.

[618] BellSouth comments at 36; *see also* PacTel reply at 16-17.

[619] 47 U.S.C. § 251(c)(3).

requesting carriers to offer telecommunications services in the manner they intend. For example, incumbent LECs may not restrict the types of telecommunications services requesting carriers may offer through unbundled elements, nor may they restrict requesting carriers from combining elements with any technically compatible equipment the requesting carriers own. We also conclude that section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide any telecommunications services that can be offered by means of the element. We believe this interpretation provides new entrants with the requisite ability to use unbundled elements flexibly to respond to market forces, and thus is consistent with the procompetitive goals of the 1996 Act.

293. We agree with AT&T and Comptel that the quoted text in section 251(c)(3) bars incumbent LECs from separating elements that are ordered in combination, unless a requesting carrier specifically asks that such elements be separated. We also conclude that the quoted text requires incumbent LECs, if necessary, to perform the functions necessary to combine requested elements in any technically feasible manner either with other elements from the incumbent's network, or with elements possessed by new entrants, subject to the technical feasibility restrictions discussed below. We adopt these conclusions for two reasons. First, in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents' network without the assistance of the incumbent. If we adopted NYNEX's proposal, we believe requesting carriers would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets. We therefore reject NYNEX's contention that the statute requires requesting carriers, rather than incumbents, to combine elements. We do not believe it is possible that Congress, having created the opportunity to enter local telephone markets through the use of

unbundled elements, intended to undermine that opportunity by imposing technical obligations on requesting carriers that they might not be able to readily meet.

294. Second, given the practical difficulties of requiring requesting carriers to combine elements that are part of the incumbent LEC's network, we conclude that section 251(c)(3) should be read to require incumbent LECs to combine elements requested by carriers. More specifically, section 251(c)(3) provides that incumbent LECs must provide unbundled elements "in a manner that allows requesting carriers to combine them" to provide a telecommunications service. We believe this phrase means that incumbents must provide unbundled elements in a way that *enables* requesting carriers to combine them to provide a service. The phrase "allows requesting carriers to combine them," does not impose the obligation of physically combining elements exclusively on requesting carriers. Rather, it permits a requesting carrier to combine the elements if the carrier is reasonably able to do so. If the carrier is unable to combine the elements, the incumbents must do so.[620]

295. Our conclusion that incumbent LECs must combine unbundled elements when so requested is consistent with the method we have adopted to identify unbundled network elements. Under our method, incumbents must provide, as a single, combined element, facilities that could comprise more than one element. This means, for example, that, if the states require incumbent LECs to provision subloop elements, incumbent LECs must still provision a local loop as a single, combined element when so requested, because we identify local loops as a single element in this proceeding.[621]

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[620] In this context, we conclude that the term "combine" means connecting two or more unbundled network elements in a manner that would allow a requesting carrier to offer the telecommunications service it seeks to offer.

[621] *See infra*, Section V.J.

296. We decline to adopt the view proffered by some parties that incumbents must combine network elements in any technically feasible manner requested. This proposal necessarily means that carriers could request incumbent LECs to combine elements that are not ordinarily combined in the incumbent's network. We are concerned that, in some instances, this could potentially affect the reliability and security of the incumbent's network, and the ability of other carriers to obtain interconnection, or request and use unbundled elements. Accordingly, incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined. Incumbent LECs are also required to perform the functions necessary to combine elements, even if they are not ordinarily combined in that manner, or they are not ordinarily combined in the incumbent's network, provided that such combination is technically feasible,[622] or such combination would not undermine the ability of other carriers to access unbundled elements or interconnect with the incumbent LEC's network. Incumbent LECs must prove to state commissions that a request to combine particular elements in a particular manner is not technically feasible, or that the request would undermine the ability of other carriers to access unbundled elements and interconnect because they have the information to support such a claim.

297. We agree with Sprint and the Florida Commission, respectively, that in some cases incumbent LECs may be required to provision a particular element in different ways, depending on the service a requesting carrier seeks to offer; and, in other instances, where a new entrant needs a particular variant of an element to offer a service, that element should be treated as distinct from other variants of the element. This means, for example, that we will treat

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[622] As discussed in Section IV, effects on network reliability and security are factors to be considered in determining technical feasibility.

local loops with a particular type of conditioning[623] as distinct elements that are different from loops with other types of conditioning.[624] As discussed below, we agree with CompTel that incumbent LECs must provide the operational and support systems necessary for requesting carriers to purchase and combine network elements. Incumbent LECs use these systems to provide services to their own end users, and new entrants similarly must have access to them to provide telecommunications services using unbundled elements.[625] Finally, we agree with BellSouth that requesting carriers must specify to incumbent LECs the network elements they seek before they can obtain such elements on an unbundled basis. We do not believe, however, that it will always be possible for new entrants to do this either before negotiations (or arbitrations) begin, or before they end, because new entrants will likely lack knowledge about the facilities and capabilities of a particular incumbent LEC's network. We further believe that incumbent LECs must work with new entrants to identify the elements the new entrants will need to offer a particular service in the manner the new entrants intend.

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[from *First Report & Order* pp. 155-165]

H. The Relationship Between Sections 251(c)(3) and 251(c)(4)

1. Background

317. Section 251(c)(4) provides that incumbent LECs must offer "for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers that are not telecommunications carriers."[685] In the NPRM, we asked for comment on the relationship between this provision and section 251(c)(3). Specifically, we asked whether carriers can order and combine network elements to offer the same services that incumbent LECs offer for resale under section 251(c)(4). We observed that different pricing standards under section 252(d) apply to unbundled elements under section 251 (c)(3) contemplates the purchase of unseparated facilities (*i.e.*, facilities that can be used for either inter-or intrastate services) while subsection (c)(4) does not necessarily contemplate this. We asked for comment on the implications or significance of these differences.[686]

2. Comments

318. A number of commenters, including incumbent LECs and CAPs, argue that, in order to distinguish section 251(c)(4) from section 251(c)(3), the Commission must conclude that new entrants can only obtain access to unbundled elements if they own or possess some local exchange facilities that they plan to use in combination with unbundled elements to provide a local service.[687] According to NYNEX, the 1996 Act contemplates that new entrants will enter local telephone markets either through section 251(c)(3) or section 251(c)(4). The former is designed for entrants with some of their own

[623] For an explanation of what conditioning of a local loop means *see infra*, Section V.J.1.

[624] Florida Commission comments at 22.

[625] Incumbent LEC back-office systems are discussed in Section V.J.

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[685] 47 U.S.C. § 251(c)(4).

[686] NPRM at para. 85.

[687] MFS comments at 36-40, 65-66; BellSouth comments at 31-33; Teleport comments at 39-42; Bell Atlantic comments at 14, reply at 5-6; Ameritect comments at 25-31; USTA comments at 23-26, reply at 10; TDS comments at 15-16; PacTel comments at 40-45; GTE reply at 17-18; SBC reply at 11; *accord* Pennsylvania Commission comments at 24; NYNEX comments at 29-39 (the FCC should state that new entrants can obtain unbundled elements to provide a service that is sold at resale only if they can self-provide, at a minimum, one of the elements used to provide the service).

facilities, and would allow them to supplement their networks; the latter is designed for new entrants that do not possess any facilities.[688] MFS and Bell Atlantic concur and cite the legislative history to the 1996 act.[689]

319. In support of this interpretation, some commenters cite the language of section 251(c)(3). Bell Atlantic contends that the phrase referring to unbundling at "any technically feasible point" means new entrants must have some of their own facilities to connect to that "point." [690] NYNEX argues that the phrase "such telecommunications service" excludes services provided by incumbents, and thus new entrants can only use unbundled elements to provide services that incumbents do not offer.[691]

320. Other commenters supporting this interpretation, including incumbent LECs and CAPs, contend that we must interpret the 1996 Act in a way that gives meaning to each provision. Accordingly, they argue that we cannot allow carriers to use unbundled elements exclusively to

[688] NYNEX reply at 16-19 (the language of the 1996 Act and the legislative history show that resale takes precedence over the unbundling provision); *accord* MFS reply at 20-22 (unbundled elements are not meant as an alternative to wholesale services for pure resellers).

[689] MFS comments at 37-40; Bell Atlantic comments at 12-14 (*citing* Joint Explanatory Statement at 148, which provides that, because of the significant investment required to duplicate an incumbent's network, new entrants will require access to elements in the incumbents' networks to supplement the facilities owned by the new entrants); *see also* Ameritech comments at 25-31 (Congress intended unbundled elements to be used by carriers that have some of their own facilities because the provision allows carriers to purchase only the elements they need); NYNEX reply at 16-19 (there is no evidence in the 1996 Act or the legislative history indicating that Congress intended to allow carriers to use unbundled elements an alternative way to resell services); USTA comments at 59-66.

[690] Bell Atlantic comments at 12-14. *See also* USTA comments at 59-66.

[691] NYNEX reply at 16-19.

provide services that are available at resale, because to do so would make section 251(c)(4), and its associated pricing provision, section 252(d)(3), meaningless.[692] They assert that Congress established a more favorable pricing standard for unbundled elements than resold services to encourage facilities-based entry. They argue that Congress, recognizing that facilities-based carriers incur greater risks than resellers and are a more potent competitive force, created a statutory incentive to build competing facilities by providing carriers who use unbundled elements with the opportunity to achieve higher profits. According to these commenters, if we allow carriers that merely resell services to obtain the financial benefits of unbundled elements, we would reward them though they have incurred little risk, and we would discourage them from building competing facilities.[693] BellSouth and Ameritech argue that the language of section 251(d)(2)(B) further supports this view because, if carriers can offer a service for resale, then such carriers are not "impaired in their ability to offer a service." [694]

321. Ameritech, NYNEX, and MFS argue that allowing carriers to provide the equivalent of a resold service exclusively through the use of unbundled elements would eviscerate the joint marketing restriction in section 271

[692] MFS comments at 36-40, 65-66; BellSouth comments at 31-33; NYNEX reply at 16-19; Bell Atlantic comments at 12-14; Bell Atlantic reply at 5-6; *accord* Teleport comments at 39-43 (specific provisions prevail over general ones, and thus, if carriers use unbundled elements to replicate a wholesale service offering, the specific provision dictating the price for wholesale services should be applied rather than the general one for unbundled elements); GTE reply at 17 (the Commission should not deprive incumbent LECs of their compensatory return on resold services).

[693] MFS comments at 37-40, reply at 20-23; Teleport comments at 39-43; NYNEX comments at 29-39; USTA comments at 23-26, reply at 8-10; Bell Atlantic comments at 12-14.

[694] BellSouth comments at 31-33; Ameritech comments at 25-31. For a further discussion of this argument *see supra*, Section V.E.

(e)(1) because there is no comparable restriction in this provision against the joint marketing of services provided through unbundled elements.[695] BellSouth and Ameritech further contend that this view is consistent with the terms of section 251(c)(4)(B), which allows states to prohibit resellers from offering a service to a category of consumers different than the category of consumers the incumbent LEC offers that service to. They contend that, if we allowed requesting carriers to offer resold services exclusively through unbundled elements, then such carriers could evade any possible prohibition on the sale of such services and the authority to impose such limitations on resale is reserved to the states.[696]

322. Finally, a number of incumbent LECs and MFS argue that new entrants should not be allowed to provide services available for resale exclusively through the use of unbundled elements because such entrants could underprice: facilities-based competitors, that must recover joint and common costs, and incumbent LECs, that charge above-cost prices for some services to support universal service obligations. If new entrants could underprice incumbent LECs, they assert, then the ability of the LECs to recover their costs and meet their universal service obligations would be diminished. They also contend that allowing the exclusive use of unbundled elements would lead to arbitrage based on the pricing standards for sections 251(c)(3) and 251(c)(4). They further contend that, if resold services are priced below cost, this will discourage facilities-based entry through the purchase of unbundled elements.[697]

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[695] Ameritech comments at 25-31, reply at 24; NYNEX reply at 16-19; MFS comments at 37-40 (further arguing that the prohibition against joint marketing through the use of resold services evidences Congress's preference for facilities-based competition).

[696] BellSouth comments at 31-33; Ameritech comments at 25-31.

[697] Ameritech comments at 25-31, reply at 22; Bell Atlantic comments at 12-14, reply at 6; USTA comments at 23-26, reply at 8-10; MFS comments at 37-40, reply at 20-23; *accord* ALLTEL reply at 7; NYNEX comments at 29-39, reply at 16-19; Teleport comments at 39-43; PacTel reply at 25.

323. The Department of Justice and a number of potential competitors, including AT&T, Cable & Wireless, ALTS and LDDS, reject the view that, to give effect to section 251(c)(4), we must limit access to unbundled elements to those carriers who own some local exchange facilities. They argue that the 1996 Act allows carriers to use recombined network elements exclusively to provide services that are similar or identical to those offered by incumbent LECs for resale. To support this view they contend that the plain language of section 251(c)(3) does not contain any requirement that carriers must own some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service. According to these commenters, if we were to impose such a requirement, we would be reading into the 1996 Act a limitation on access to unbundled elements that is not stated anywhere within the statute.[698]

324. The parties which oppose conditioning access to unbundled elements on ownership of local exchange facilities also contend that sections 251(c)(3) and 251(c)(4) offer carriers different opportunities, and thus the rules of statutory construction do not require us to read use restrictions into section 251(c)(3) to distinguish and give meaning to section 251(c)(4).[699] AT&T, the Department

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[698] AT&T comments at 28-31, reply at 12-20; TCC comments at 27-35; Cable & Wireless comments at 26-27, reply at 20-22; DoJ comments at 48-51, reply at 23-31; Sprint reply at 24-26; LDDS reply at 25-27; ALTS reply at 24-26; *but see* GTE reply at 17-18 (new entrants have just as much opportunity to offer new services through resale as they do through unbundled elements, with resold services new entrants can add value and develop new price plans).

[699] AT&T comments at 28-31, reply at 13-20; LDDS reply at 25-28; TCC comments at 27-35; CompTel reply at 13-22; DoJ comments at 48-51, reply at 23-31 (carriers will likely use resale to purchase

of Justice, and others argue, for example, that carriers offering services through resale are limited to the precise service that the incumbent is providing. In contrast, these parties assert that carriers exclusively using unbundled elements can offer different and new services, or the same services with higher quality. In addition, these parties note that, under section 251(c)(3), carriers purchasing an unbundled element can provide all services which that element is typically used to provide, but under section 251(c)(4), carriers purchasing services available for resale can only provide the service they purchase.[700]

325. Some of the commenters opposing restrictions on access to unbundled elements further argue that allowing carriers to use unbundled elements exclusively to provide the same or similar services that are sold at resale would reduce barriers to entry, and thus promote facilities-based competition. They explain that entrants using unbundled elements will incur lower costs, and will be able to offer more services than carriers who purchase services for resale. They further contend that this means that new entrants using unbundled elements will earn higher revenues, and will have more funds to build competing facilities, than carriers purchasing services available for resale. They also contend that a requirement that carriers own some facilities to purchase unbundled elements would impede entry into the access market and restrict competition for all local services to areas where construction of duplicate facilities is economically justified and has already occurred. Congress, they argue, did not intend to encour-

services that incumbents price beolw cost, otherwise these services would never experience competition); Sprint comments at 24-26; Cable & Wireless comments at 20-22; MCI comments at 27-28 (carriers purchasing unbundled elements are not purchasing services, hence they are not the same thing as services available for resale).

[700] AT&T comments at 28-31, reply at 13-20; LDDS reply at 25-28; TCC comments at 27-35; CompTel reply at 13-22; DoJ comments at 48-51, reply at 23-31; Sprint comments at 24-26; Cable & Wireless comments at 20-22; MCI comments at 27-28.

age the build out of competing facilities where it is not efficient and the reason Congress included the unbundling provision in the 1996 Act is because most areas only have one network.[701]

326. Some of the commenters who oppose restricting access to unbundled elements to those carriers who own some local exchange facilities also argue that any such restriction would be administratively burdensome and difficult to enforce. They contend, for example, that we would need to specify certain minimum facilities that carries would need to own to obtain access to unbundled elements. They contend that, if we did not specify such minimum facilities, but merely required ownership or possession of a single facility (or any facility), then the requirement in general would have no practical significance.[702] The Department of Justice contends that we would need to determine whether carriers must own or possess a local exchange facility that is used for each consumer to whom they provide service.[703] In determining the relationship between sections 251(c)(3) and 251(c)(4), the Illinois Commission asks us to consider whether our interpretation would advance competition, reduce regulation, preserve and advance universal service, remove statutory, regulatory and economic impediments to new entry, and provide states with flexibility.[704]

327. Finally, NYNEX argues that carries should not be permitted to offer services to consumers by combining unbundled elements and resold services because the different rates for unbundled elements and resale of services

[701] AT&T comments at 28-31, reply at 13-20; CompTel reply at 13-22; TCC comments at 27-35; DOJ comments at 48-51, reply at 23-31.

[702] DoJ comments at 48-51, reply at 23-31; AT&T reply at 13-20; Cable & Wireless reply at 20-22; LDDS reply at 25-30.

[703] DoJ comments at 48-51, reply at 23-31.

[704] Illinois Commission comments at 38.

would allow for arbitrage.[705] Comptel and Sprint counter, however, that the 1996 Act does not prohibit the combined use of unbundled elements and resold services. Comptel further contends that Congress intended to provide new entrants with maximum flexibility in connection with opportunities to enter local telephone markets and thus it would be contrary to Congressional intent, as well as anti-competitive, if we prohibited carriers from using a combination of unbundled elements and services available for resale.[706]

3. Discussion

328. The language of section 251(c)(3) is cast exclusively in terms of obligations imposed on incumbent LECs, and it does not discuss, reference, or suggest a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements. We conclude, therefore, that Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service. We note that the Illinois Commission has reached the same conclusion.[707]

329. We reject the arguments advanced by Bell Atlantic and NYNEX that the language of section 251(c)(3) requires carriers seeking access to unbundled elements to own some local exchange facilities, and that this serves to distinguish section 251(c)(3) from section 251(c)(4). The "at any technically feasible point" language in section 251(c)(3) refers to points in an incumbent LEC's

[705] NYNEX comments at 38-39.

[706] CompTel reply at 20-22; Sprint comments at 23-28.

[707] AT&T Communications of Illinois, Inc. *et al.*, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, Nos. 95-0458 and 95-0531 (consol.) at 63-65 (Illinois Commission June 26, 1996).

network where new entrants may obtain access to elements. It does not, however, require that new entrants interconnect local exchange facilities which they own or control at that technically feasible access point. If we were to conclude otherwise, then new entrants would be prohibited from requesting two network elements that are connected to each other because the new entract would be required to connect a single network element to a facility of its own. The 1996 Act, however, does not impose any limitations on carriers' ability to obtain access to unbundled network elements. Moreover, we conclude that Congress did not intend to limit acces to unbundled elements in this manner because such a limit would seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thus would retard the development of local exchange competition. We also reject NYNEX's argument that the phrase "such telecommunications service" excludes services provided by the incumbent. This interpretation is inconsistent with the 1996 Act's definition of a telecommunications service, which includes all telecommunications services provided by an incumbent.

330. We also reject the argument that language in the Joint Explanatory Statement requires us to conclude that carriers must own facilities to obtain access to unbundled elements. Congress may have recognized that carrriers that own some of their own facilities will more likely benefit by entering local markets through unbundled elements rather than resale, but this consideration does not imply that carriers must own their own facilities to obtain access to unbundled elements.[708]

331. We are not persuaded that, in order to give meaning and effect to section 251(c)(4), we must require new entrants to own some local exchange facilities in order to obtain access to unbundled elements. We disagree with the premise thaat no carrier would consider

[708] *See* Joint Explanatory Statement at 148.

entering local markets under the terms of section 251(c)(4) if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefore find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity as a means to enter local phone markets.

332. The principal distinction between sections 251(c)(3) and 251(c)(4), in terms of the opportunities each section presents to new entrants, is that carriers using solely unbundled elements, compared with carriers purchasing services for resale, will have greater opportunities to offer services that are different from those offered by incumbents. More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service. The ability of a reseller to differentiate itis products based on price is limited, however, by the margin between the retail and wholesale price of the product.

333. In contrast, a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent. For example, some incumbent LECs have capabilities within their networks, such as the ability to offer Centrex, which they do not use to offer services to consumers. Carriers purchasing access to unbundled elements can offer such services.

Additionally, carriers using unbunled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the incumbent's existing service offerings increases the requesting carrier's ability to compete against the incumbent and is likely to benefit consumers.[709] Additionally, carriers solely using unbundled network elements can offer exchange access services. These services, however, are not available for resale under section 251(c)(4) of the 1996 Act.[710]

334. If a carrier taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks. A carrier purchasing unbundled elements must pay for the cost of that facility, pursuant to the terms and conditions agreed to in negotiations or ordered by states in arbitrations.[711] It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. (Many network elements can be used to provide a number of different services.) A carrier that resells an incumbent LEC's services does not face the same risk. This distinction in the risk borne by carriers entering local markets through resale as opposed to unbundled elements is likely to influence the entry strategies of various potential competitors. Some new entrants will be unable or unwilling to bear the financial risks of entry by means of unbundled elements and will choose to enter local markets under the terms of section 251(c)(4) irrespective of the fact that

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[709] *See* AT&T comments at 25-31.

[710] *See infra*, Section VII; *see also* Letter from Bernard J. Ebbers, President LDDS WorldCom, to Rachelle B. Chong, Commissioner, Federal Communications Commission, July 11, 1996.

[711] *See infra*, Section VII, describing the terms under which new entrants will pay for the cost of unbundled elements.

they can obtain access to unbundled elements without owning any of their own facilities.[712] Moreover, some markets may never support new entry through the use of unbundled elements because new entrants seeking to offer services in such markets will be unable to stimulate sufficient demand to recoup their investment in unbundled elements. Accordingly, in these markets carriers will enter through the resale of incumbent LEC services irrespective of the fact that they could enter exclusively through the use of unbundled elements.[713]

335. We are not persuaded by the argument set forth by Ameritech, NYNEX, and MFS that allowing carriers to use solely recombined network elements would eviscerate the joint marketing restriction in section 271(e)(1).[714] It is true that the terms of section 271(e) do not restrict joint marketing through the use of unbundled elements pursuant to section 251(c)(3). As discussed above, differences in opportunities and risk will cause some new entrants to consider entering local telephone markets through resale of incumbent LEC services, even if they could enter solely through the use of unbundled elements. Thus, we conclude that section 271(e)(1) will impose a meaningful limitation on joint marketing.

336. We note, moreover, that the 1996 Act does not prohibit all forms of joint marketing. For example, it does not prohibit carriers who own local exchange facilities from jointly marketing local and interexchange service. Nor does it prohibit joint marketing by carriers who provide local exchange service through a combination of local facilities which they own or possess, and unbundled elements. Because the 1996 Act does not prohibit all forms of joint marketing, we see no principled basis for reading into section 271(e)(1) a further limitation on the ability of carriers to jointly market local and long distance services without concluding that this section prohibits all forms of joint marketing. In other words, we see no basis upon which we could conclude that section 271(e)(1) restricts joint marketing of long distance services, and local services provided solely through the use of unbundled network elements, without also concluding that the section restricts the ability of carriers to jointly market long distance services and local services that are provided through a combination of a carriers' own facilities and unbundled network elements.[715] Moreover, we do not believe that we have the discretion to read into the 1966 Act a restriction on competition which is not required by the plain language of any of its sections.

337. We also reject the argument advanced by BellSouth and Ameritech that allowing carriers to use solely unbundled elements to provide services available through resale would allow carriers to evade a possible prohibition, which is reserved to the discretion of the states, on the sale of certain services to certain categories of consumers. Under section 251(c)(4)(B) states are permitted to restrict resellers from offering certain services to certain consumers, in the same manner that states restrict incumbent LECs.[716] For example, states that prohibit incumbent LECs from selling to business consumers resi-

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[712] *See, e.g.*, AT&T reply at 13-20.

[713] *See, e.g.*, Comptel reply at 13-16.

[714] Section 271(e)(1) provides that "[u]ntil a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment . . . a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services." 47 U.S.C. § 271(e)(1).

[715] *See also* AT&T reply at 14-15 (the added risk of unbundled elements also means that new entrants are not circumventing section 271's joint marketing restriction because the additional risk justifies allowing carriers more flexibility to jointly market services); LDDS reply at 28-30.

[716] 47 U.S.C. § 251(c)(4)(B).

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dential services priced below cost have the ability to restrict resellers from selling such services to business consumers.

338. We do not believe, however, that carriers using solely unbundled elements to provide local exchange services will be able to evade any potential restrictions states may impose under section 251(c)(4)(B). In this section Congress granted the states the discretion to impose certain limited restrictions on the sale of services available for resale. It did not, however, grant states, in section 251 (c)(3), the same discretion to impose similar restrictions on the use of unbundled elements. Accordingly, we are not persuaded that allowing carriers to use solely unbundled elements to provide services that incumbent LECs offer for resale would allow competing carriers to evade a possible marketing retriction that Congress intended to reserve to the discretion of the states.

339. We agree with those commenters who argue that it would be administratively impossible to impose a requirement that carriers must own some of their own local exchange facilities in order to obtain access to unbundled elements, and they must use these facilities, in combination with unbundled elements, for the purpose of providing local services. We conclude that it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation. We further conclude that such a requirement could delay possible innovation. These effects would diminish competition for local telephone services, and thus any local exchange facilities requirement would be inconsistent with the 1996 Act's goals of promoting competition. Moreover, if we imposed a facilities ownership requirement that attempted to avoid these competitive pitfalls, it would likely be so easy to meet it would ultimately be meaningless.

340. We reject the argument that requiring carriers to own some local exchange facilities would promote

competition for local exchange services, or that we should impose such a requirement for other policy reasons. To the contrary, we conclude that allowing carriers to use unbundled elements as they wish, subject only to the maintenance of the key elements of the access charge regime, described below at section VII, will lead to more efficient competition in local phone markets. If we were to limit access to unbundled network elements to those markets where carriers already own, or could efficiently build, some local exchange facilities we would limit the ability of carriers to enter local markets under the pricing standard for unbundled elements to those markets that could efficiently support duplication of some or all of the incumbent LECs' networks. We believe that such a result could diminish competition, and that allowing new entrants to take full advantage of incumbent LECs' scale and scope economies will promote more rapid and efficient entry and will result in more robust competition.

341. Finally, we concluded that a new entrant may offer services to one group of consumers using unbundled network elements, and it may offer services to a separate group of consumers by reselling an incumbent LEC's services. With the exception noted in Section VII, *infra*, we do not address the issue of whether the 1996 Act permits a new entrant to offer services to the same set of consumers through a combination of unbundled elements and services available for resale.

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[from *First Report & Order* pp. 341-343]

(b) Cost Measures Not Included in Forward-Looking Cost Methodology

704. *Embedded Costs.* We read section 252(d)(1)(A)(i) to prohibit states from conducting traditional rate-of-return or other rate-based proceedings to determine rates for interconnection and access to unbundled network elements. We find that the parenthetical, "(determined without reference to a rate-of-return or other rate-

based proceeding)','[1712] does not further define the type of costs that may be considered, but rather specifies a type of proceeding that may not be employed to determine the cost of interconnection and unbundled network elements. The legislative history demonstrates that Congress was eager to set in motion expeditiously the development of local competition and intended to avoid imposing the costs and administrative burdens associated with a traditional rate case. Prior to the joint conference, the Senate version of the 1996 Act contained the parenethetical language.[1713] In addition, the Senate version of the 1996 Act eliminated rate-of-return regulation.[1714] as did the House version.[1715] Conferees removed the provisions eliminating rate-of-return regulation, but retained the parenethetical.

705. Section 252(d)(1)(A)(i) does not specify whether historical or embedded costs should be considered or whether only forward-looking costs should be considered in setting arbitrated rates. We are not persuaded by incumbent LEC arguments that prices for interconnection and unbundled network elements must or should include

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[1712] 47 U.S.C. § 252(d)(1)(A)(i).

[1713] S. 652, 104th Cong., 1st Sess. § 251(d)(6)(A) (1995) ("the charge (A) shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the unbundled element . . . .").

[1714] *Id.* at § 301(a)(3) ("Rate of Return Regulation Eliminated—(A) In instituting the price flexibility required under paragraph (1) the Commission and the States shall establish alternative forms of regulation for Tier 1 telecommunications carriers that do not include regulation of the rate of return earned by such carrier . . . .").

[1715] H.R. 1555, 104th Cong., 1st Sess. § 248(b) (1995) ("Abolition of Rate-of-Return Regulation—Notwithstanding any other provision of law, to the extent that a carrier has complied with sections 242 and 244 of this part, the Commission, with respect to rates for interstate or foreign communications, and State commissions, with respect to rates for intrastate communications, shall not require rate-of-return regulation.").

any difference between the embedded costs they have incurred to provide those elements and their current economic costs. Neither a methodology that establishes the prices for interconnection and access to network elements directly on the costs reflected in the regulated books of account, nor a price based on forward looking costs plus an additional amount reflecting embedded costs, would be consistent with the approach we are adopting. The substantial weight of economic commentary in the record suggests that an "embedded cost"-based pricing methodology would be pro-competitor—in this case the incumbent LEC—rather than pro-competition.[1716] We therefore decline to adopt embedded costs as the appropriate basis of setting prices for interconnection and access to unbundled elements. Rather, we reiterate that the prices for the interconnection and network elements critical to the development of a competitive local exchange should be based on the pro-competition, forward-looking, economic costs of those elements, which may be higher or lower than historical embedded costs. Such pricing policies will best ensure the efficient investment decisions and competitive entry contemplated by the 1996 Act, which should minimize the regulatory burdens and economic impact of our decisions on small entities.[1717]

706. Incumbent LECs contend generally that, in order to ensure that they will recover their total investment costs and earn a profit, they must recover embedded costs. These costs, they argue, were incurred under federal and

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[1716] *See, e.g.*, Ad Hoc Telecommunications Users' Committee reply at Appendix A (Interconnection Pricing Standards for Monopoly Rate Elements in a Potentially Competitive Local Telecommunications Market), p.4; ALTS comments at Attachments B (Competitive Pricing of Interconnection, Unbundled Elements and Collocation), pp. 28-29; AT&T reply at Appendix B (Reply Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), pp. 3-5; Competition Policy Institute comments at 18-19; DJ comments at 30-31.

[1717] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601, *et seq.*

regulatory oversight and therefore should be recoverable.[1718] We are not convinced by the incumbent LECs' principal arguments for recognizing embedded cost in setting section 251 pricing rules. Even if the incumbent LECs' contention is correct, increasing the rates for interconnection and unbundled elements offered to competitors would interfere with the development of efficient competition, and is not the proper remedy for any past underdepreciation. Moreover, contrary to assertions by some incumbent LECs, regulation does not and should not guarantee full recovery of their embedded costs. Such a guarantee would exceed the assurances that we or the states have provided in the past.[1719]. We have considered the economic impact of precluding recovery of small incumbent LECs' embedded costs.[1720] We do not believe that basing the prices of interconnection and unbundled elements on an incumbent LEC's embedded costs would advance the pro-competitive goals of the statute. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.[1721]

707. We acknowledge that some incumbent LECs may have incurred certain embedded costs reasonably before the passage of the 1996 Act, based on different regulatory regimes. Some incumbent LECs may assert that they have made certain historical investments required by regulators that they have been denied a reasonable opportunity to

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[1718] *See, e.g.*, Ameritech reply at 31; BellSouth comments at 57; Lincoln Tel. comments at 16-17.

[1719] *See In the Matter of the Applications of Pacific Bell*, Order and Authorization, 10 FCC Rcd 12448, 12502-12503 (1995).

[1720] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1721] 47 U.S.C. § 251(f).

recover in the past and that the incumbent LECs may no longer have a reasonable opportunity to recover in the new environment of the 1996 Act. The record before us, however, does not support the conclusion that significant residual embedded costs will necessarily result from the availability of network elements at economic costs. To the extent that any such residual consists of costs of meeting universal service obligations, the recovery of such costs can and should be considered in our ongoing universal service proceeding.[1722] To the extent a significant residual exists within the interstate jurisdiction that does not fall within the gambit of section 254, we intend that to address that issue in our upcoming proceeding on access reform.

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[from *First Report & Order* pp. 619-629]

B. Requirements of Section 252(i)

1. Background

1296. Section 251 requires that interconnection, unbundled element, and collocation rates be "nondiscriminatory" and prohibits the imposition of "discriminatory conditions" on the resale of telecommunications services.[3164] Section 252(i) of the 1996 Act provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the

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[1722] *See Universal Service* NPRM at para. 32.

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[3164] 47 U.S.C. §§ 251(c)(2)(D) (interconnection rates, terms, and conditions); 251(c)(3) (unbundled network elements rates, terms, and conditions); 251(c)(6) (collocation rates, terms, and conditions); and 251(c)(4)(B) (resale). Section 252(d)(1) also requires nondiscriminatory interconnection and network element charges. 47 U.S.C. § 252(d)(1).

agreement."[3165] In the NPRM, we expressed the view that section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251, and we sought comment on whether we should adopt national standards for resolving disputes under section 252(i) in the event that we must assume the state's responsibilities pursuant to section 252(e)(5). In addition, because we may need to interpret section 252(i) if we assume the state commission's responsibilities, we sought comment on the meaning of section 252(i).

1297. We also sought comment in the NPRM on whether section 252(i) requires that only similarly-situated carriers may enforce against incumbent LECs provisions of agreements filed with state commission, and, if so, how "similarly-situated carrier" should be defined. In particular, we asked whether section 252(i) requires that the same rates for interconnection must be offered to all requesting carriers regardless of the cost of serving that carrier, or whether it would be consistent with the statute to permit different rates if the costs of serving carriers are different. We also asked whether the section can be interpreted to allow incumbent LECs to make available interconnection, services, or network elements only to requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interchange) as the original parties to the agreement. In the NPRM, we tentatively concluded that the language of the statute appears to preclude such differential treatment among carriers.

1298. Additionally, we sought comment in the NPRM on whether section 252(i) permits requesting telecommunications carriers to choose among individual provisions of publicly-filed interconnection agreements or whether they must subscribe to an entire agreement. We also sought comment regarding what time period an agree-

[3165] 47 U.S.C. § 252(i).

ment must remain available for use by other requesting telecommunications carriers.

2. Comments

1299. Two state commissions and SBC believe that implementation of section 252(i) should be left to the states,[3166] while Time Warner favors national standards.[3167] CompTel argues that we should adopt expedited procedures whereby carriers may complain to the Commission when incumbent LECs refuse to make agreements available to them in alleged violation of section 252(i).[3168]

1300. New entrants generally support the view that section 252(i) does not require that requesting carriers seeking to avail themselves of a prior negotiated or arbitrated agreement be "similarly situated" with respect to the original party who negotiated the agreement.[3169] They argue that such a limitation would be contrary to Congress's intent,[3170] or that it could invite perpetual dispute over which carriers are similarly situated and what cost differences are real and material.[3171] Winstar questions whether states could implement a "similarly situated"

[3166] Pennsylvania Commission comments at 43; Louisiana Commission comments at 28-29; SBC Comments at 24.

[3167] Time Warner comments at 112.

[3168] CompTel comments at 107.

[3169] WinStar comments at 18-19; CompTel comments at 106; LDDS comments at 88; Time Warner comments at 113; ACSI reply at 23-24; Telecommunications Resellers Ass'n comments at 50.

[3170] CompTel comments at 106; LDDS comments at 88; Time Warner comments at 113. CompTel also asserts that, subject to cost-based deviations, no carrier should pay more than any other carrier when it purchases the same service or facility from the same incumbent LEC, nor should agreements include language regarding the nature of the carrier who may subsequently enter into the same agreements. CompTel comments at 106.

[3171] Telecommunications Resellers Ass'n comments at 50-51.

carrier requirement without unintentionally creating a vehicle for incumbent LECs to discriminate against competitive entrants.[3172] LDDS specifically agrees with the NPRM's tentative conclusion that section 252(i) prohibits incumbent LECs from limiting the availability of agreements to a carrier based on the class of customers the carrier serves or the type of service it provides.[3173] The Telecommunications Resellers Ass'n believes section 252 (i) prohibits discrimination on the basis of the cost of serving a carrier, and claims its members have been, and continue to be, denied preferred service offerings and price points in the interexchange market under the guise of a "similarly situated" criterion.[3174]

1301. WinStar suggests we assign the incumbent LEC a heavy burden of proving that a new carrier is substantially different from the original parties to an agreement, and that we require the incumbent LEC to provide service to the new entrant according to the individual terms of an agreement while the dispute is pending. Win Star asserts that, absent such requirements, the incumbent LEC could use alleged technological differences to create barriers to entry.[3176]

1302. GTE, PacTel, USTA, BellSouth, and the Ohio Consumers' Counsel believe the statute contemplates drawing distinctions between carriers,[3176] such as, for instance,

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[3172] WinStar comments at 18-19.

[3173] LDDS comments at 88.

[3174] Telecommunications Resellers Ass'n comments at 50-51.

[3175] WinStar comments at 19 n.14. WinStar further suggests that the LEC should be required to adjust the arrangement to account for differences in technology employed by the new entrant, without revising material terms of the arrangement. *Id.*

[3176] GTE comments at 82-83; PacTel comments at 101; USTA comments at 95-96; BellSouth comments at 80-81; Ohio Consumers' Counsel comments at 51.

where the incumbent LEC faces different costs in serving different carriers. [3177] According to GTE and PacTel, carriers must be "similarly situated" because the subsequent carrier's technical requirements may be incompatible with the LEC's network. [3178] GTE asserts that providing service under an agreement to carriers that are not similarly situated with respect to the technical feasibilty and costs of interconnection and transport and termination would be inconsistent with the 1996 Act's requirements that interconnection be technically feasible and offered at cost-based rates.[3179]

1303. Incumbent LECs also generally oppose the view that section 252(i) permits competitive carriers to choose among provisions in a publicly-filed interconnection agreement.[3180] For instance, BellSouth contends that the text of section 252(i) supports its view, and that the legislative history reference cited in the NPRM casts no light on Congress' intent because the House did not recede to the Senate's language.[3181] GTE urges the Commission to treat the availability of agreements under section 252(i) the same way it treats AT&T Tariff 12 and Contract Tariff Offerings.[3182] Ameritech, GTE and SBC also contend that section 252(i)'s requirement that a requesting carrier take service upon the same terms and conditions as the original carrier precludes unbundled availability.[3183] USTA argues

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[3177] GTE comments at 82-83; Municipal Utilities comments at 14; USTA comments at 96.

[3178] GTE comments at 82-83; PacTel comments at 101.

[3179] GTE comments at 83.

[3180] *See, e.g.*, Ameritech comments at 98-99; BellSouth comments at 81; Bay Springs *et al* comments at 19; GTE comments at 83; SBC comments at 24; USTA comments at 96-97.

[3181] BellSouth comments at 81.

[3182] GTE comments at 83; *see also* BellSouth comments at 81; USTA comments at 97.

[3183] Ameritech comments at 99; GTE comments at 83; SBC comments at 24.

unbundled availability of agreement provisions will skew the individualized nature of negotiations, magnify the importance of each individual term of an agreement, and encourage incumbent LECs to offer only standardized, relatively high-cost packages.[3184]

1304. New entrants, joined by the Ohio Commission, support the view that the statute makes individual provisions of agreements available to carriers.[3185] They argue that this comports with the statutory language and legislative history,[3186] and that requiring requesting carriers to take an entire agreement will cause delay[3187] and foster discrimination by enabling incumbent LECs to fashion agreements so that no subsequent carrier may benefit from them.[3188] MCI argues that, although this approach may make incumbents less likely to compromise, the effect on negotiations will be small.[3189] The SBA asserts allowing entrants to utilize individual provisions of agreements

[3184] USTA comments at 96,

[3185] *See, e.g.*, ALTS comments at 54-55; LDDS comments at 89; Jones Intercable comments at 36; Sprint reply at 48; CompTel reply at 45; AT&T comments at 89-90; NEXTLINK comments at 36-37; MFS comments at 81-90; Time Warner reply at 45-46; Telecommunications Resellers Ass'n comments at 51; Ohio Commission comments at 84. Teleport argues that, if the FCC does not adopt its "preferred outcomes" paradigm for negotiations, it should allow carriers to pick and choose among provisions, asserting that without the ability to pick and choose among provisions, unequal bargaining conditions between LECs and competitive LECs will make meaningful negotiations impossible. Teleport comments at 54-55.

[3186] WinStar comments at 17-18; MCI comments at 96; Jones Intercable comments at 36; SBA comments at 17; Time Warner Reply at 46.

[3187] WinStar comments at 18.

[3188] *See, e.g.*, Telecommunications Resellers Ass'n comments at 51; Sprint reply at 48; AT&T comments at 90 n.139; MFS comments at 90-91.

[3189] MCI comments at 96.

will lead to increased competition, which, in turn, will drive prices towards the most economically efficient levels, and that these benefits outweigh any additional burden that such unbundling may place upon incumbents in negotiating agreements.[3190] SBA further argues that failure to permit unbundling of agreements would deter entry by smaller competitors that are unable or unwilling to pay for all of the elements contained in an agreement negotiated by a larger competitor.[3191] CompTel asks that we rule that an incumbent LEC may not insist upon the observance of any term or condition that is not reasonable in the context of the requesting carrier.[3192]

1305. ALTS suggests that we permit unbundled availability to the level of the individual paragraphs and sections of section 251, with the exception of network elements provided pursuant to section 251(c)(3), which ALTS believes should be provided individually to nonparties on a disaggregated basis.[3193] ALTS argues such a rule would reduce concern that unbundled availability would slow the negotiation process by magnifying the importance of individual terms.[3194] Jones Intercable requests that we clarify that the statute permits so-called "most favored nation" provisions, which allow a new entrant with an interconnection agreement in place with an incumbent LEC to modify such an agreement to substitute the preferable terms included in a later agreement that the incumbent LEC enters with a subsequent new entrant.[3195]

[3190] SBA comments at 18.

[3191] SBA comments at 16-17; *see also* R. Koch comments at 3.

[3192] ComTel comments at 107.

[3193] ALTS comments at 54-55.

[3194] *Id.*

[3195] Jones Intercable comments at 36.

1306. Parties' suggestions for the length of time agreements should remain on file pursuant to section 252(i) range from a reasonable period,[3196] until changes in the network adopted for independent reasons make it no longer feasible to provide interconnection under an agreement,[3197] to as long as the agreement remains in operation.[3198] Out of concern that incumbent LECs might force competitors to renegotiate agreements at unreasonably short intervals, the SBA argues that there should be no arbitrary limit on the duration of agreements.[319]

1307. Several new entrants also raise issues concerning the filing of agreements pursuant to section 252(i). Jones Intercable urges us to require that incumbent LEC's file copies of all negotiated agreements at the FCC, as well as at state commissions.[3200]

1308. AT&T and the Telecommunications Resellers Ass'n believe section 252(i) requires that interconnection agreements negotiated prior to enactment of the 1996 Act be available for use by requesting telecommunications carriers,[3201] while F. Williamson opposes this view.[3202] MFS,

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[3196] BellSouth comments at 81-82. GTE suggested agreements remain publicly available for a reasonable period, as Commission requires for AT&T's Tariff 12. GTE comments at 83.

[3197] MCI comments at 97.

[3198] Telecommunications Resellers Ass'n comments at 51-52; Time Warner comments at 114; Lincoln Tel. comments at 25-26.

[3199] SBA comments at 18.

[3200] Jones Intercable comments at 20.

[3211] AT&T comments at 89; Telecommunications Resellers Ass'n comments at 52.

[3202] F. Williamson comments at 5 (arguing that nothing in the 1996 Act requires that existing agreements be submitted or resubmitted to a state commission for approval). F. Williamson further comments that the statute does not permit one party to an existing agreement compel renegotiation (and/or arbitration) under the procedures in section 252. *Id.*

NCTA and WinStar urge us to find that section 252(i) applies to interconnection agreements between adjacent, non-competing LECs.[3203] BellSouth is opposed.[3204]

3. Discussion

1309. We conclude that it will assist the carriers in determining their respective obligations, facilitate the development of a single, uniform legal interpretation of the Act's requirements and promote a procompetitive, national policy framework to adopt national standards to implement section 252(i). Issues such as whether section 252(i) allows requesting telecommunications carriers to choose among provisions of prior interconnection agreements or requires them to accept an entire agreement are issues of law that should not vary from state to state and are also central to the statutory scheme and to the emergence of competition. National standards will help state commissions and parties to expedite the resolution of disputes under section 252(i).

1310. We conclude that the text of section 252(i) supports requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection agreements. As we note above, section 252(i) provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[3205] Thus, Congress drew a distinction between "any interconnection, service, or network element[s] provided under an agreement," which the statute lists individ-

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[3203] MFS comments at 86; NCTA reply at 13; WinStar reply at 19.

[3204] BellSouth comments at 64; *see also* Rural Tel. Coalition comments at 15-16 (asserting sections 251-252 do not apply to agreements between adjacent, non-competing carriers).

[3205] 47 U.S.C. § 252(i).

ually, and agreements in their totality. Requiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements, would render as mere surplusage the words "any interconnection, service, or network element."

1311. We disagree with BellSouth regarding the significance of the legislative history quoted in the NPRM. The Conference Committee amended section 251(g), S. 652's predecessor to section 252(i), and changed "service, facility, or function" to "interconnection, service, or element." The House of Representatives' bill did not contain a version of section 252(i),[3206] We find that section 252(i)'s language does not differ substantively from the text of the Senate bill's section 251(g). The Senate Commerce stated its provision, section 251(g), was intended to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated."[3207]

1312. We also find that practical concerns support our interpretation. As observed by AT&T and others, failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement. In addition, we observe that different new entrants face differing technical constraints and costs. Since few new entrants would be willing to elect an entire agreement that would not reflect their costs and the specific technical characteristics of their networks or would not be con-

[3206] Although H.R. 1555's section 244(d) contained similar ideas, its language and structure are sufficiently different from that of section 252(i) that we do not consider section 244(d) to be a prior version of section 251(i).

[3207] *Report of the Committee on Commerce, Science, and Transportation on S. 652*, S. Rpt. 104-23, 104th Cong., 1st Sess. (1995) at 21-22.

sistent with their business plans, requiring requesting carriers to elect an entire agreement would appear to eviscerate the obligation Congress imposed in section 252(i).

1313. We also choose this interpretation despite concerns voiced by some incumbent LECs that allowing carriers to choose among provisions will harm the public interest by slowing down the process of reaching interconnection agreements by making incumbent LECs less likely to compromise. In reaching this conclusion, we observe that new entrants, who stand to lose the most if negotiations are delayed, generally do not argue that concern over slow negotiations would outweigh the benefits they would derive from being able to choose among terms of publicly filed agreements. Unbundled access to agreement provisions will enable smaller carriers who lack bargaining power to obtain favorable terms and conditions—including rates—negotiated by large IXCs, and speed the emergence of robust competition.[3208]

1314. We conclude that incumbent LECs must permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252. We find that this level of disaggregation is mandated by section 252(a)(1), which requires that agreements shall include "charges for interconnection and each service or network element included in the agreement," and section 251(c)(3), which requires incumbent LECs to provide "non-discriminatory access to network elements on an unbundled basis." In practical terms, this means that a carrier may obtain access to individual elements such as unbundled loops at the same rates, terms, and conditions as contained in any approved agreement. We agree with ALTS that such a view comports with the

[3208] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

statute, and lessens the concerns of carriers that argue that unbundled availability will delay negotiations.

1315. We reject GTE's argument that section 252(i)'s statement, that requesting carriers must receive individual elements "upon the same terms and conditions" as those contained in the agreement, precludes unbundled availability of individual elements. GTE's argument fails to give meaning to Congress's distinction between agreements and elements, and ignores the 1996 Act's prime goals of nondiscriminatory treatment of carriers and promotion of competition. Instead, we conclude that the "same terms and conditions" that an incumbent LEC may insist upon shall relate solely to the individual interconnection, service, or element being requested under section 252(i). For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops. Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought. By contrast, incumbent LECs may not require as a "same" term or condition the new entrant's agreement to terms and conditions relating to other interconnection, services, or elements in the approved agreement. Moreover, incumbent LEC efforts to restrict availability of interconnection, services, or elements under section 252(i) also must comply with the 1996 Act's general nondiscrimination provisions. *See* Section VII.d.3.

1316. We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers' obtain access to terms and elements on a nondiscriminatory basis.

1317. We find that section 252(i) permits differential treatment based on the LEC's cost of serving a carrier. We further observe that section 252(d)(1) requires that unbundled element rates be cost-based, and sections 251(c)(2) and (c)(3) require incumbent LECs to provide only technically-feasible forms of interconnection and access to unbundled elements, while section 252(i) mandates that the availability of publicly-filed agreements be limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC. We conclude that these provisions, read together, require that publicly-filed agreements be made available only to carriers who cause the incumbent LEC to incur no greater costs than the carrier who originally negotiated the agreement, so as to result in an interconnection arrangement that is both cost-based and technically feasible. However, as discussed in Section VII regarding discrimination, where an incumbent LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state commission that that differential treatment is justified based on the cost to the LEC of providing that element to the carrier.

1318. We conclude, however, that section 252(i) does not permit LECs to limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement. In our view, the class of customers, or the type of service provided by a carrier, does not necessarily bear a direct relationship with the costs incurred by the LEC to interconnect with that carrier or on whether interconnection is technically feasible. Accordingly, we conclude that an interpretation of section 252(i) that attempts to limit availability by class of customer served or type of service provided would be at odds with the language and structure of the statute, which contains no such limitation.

1319. We agree with those commenters who suggest that agreements remain available for use by requesting carriers for a reasonable amount of time. Such a rule addresses incumbent LEC concerns over technical incompatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the pricing and network configuration choices are likely to change over time, as several commenters have observed. Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreeemnt or term have changed.

1320. We observe that section 252(h) expressly provides that state commissions maintain for public inspection copies of interconnection agreements approved under section 252(f). We therefore decline Jones Intercable's suggestion that we require carriers to file agreements at the FCC, in addition to section 252(h)'s filing requirement. However, when the Commission performs the state's responsibilities under section 252(e)(5), parties

must file their agreements with the Commission, as well as with the state commission.[3209]

1321. We further conclude that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis. We find that this interpretation furthers Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms, and that we should adopt measures that ensure competition occurs as quickly and efficiently as possible. We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement. Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis. Because of the importance of section 252(i) in preventing discrimination, however, we conclude that carriers seeking remedies for alleged violations of section 252(i) shall be permitted to obtain expedited relief at the Commission, including the resolution of complaints under section 208 of the Communications Act, in addition to their state remedies.

1322. We conclude as well that agreements negotiated prior to enactment of the 1996 Act must be available for use by subsequent, requesting carriers. Section 252(i) must be read in conjunction with section 252(a)(1), which clearly states that "agreement" for purposes of section 252, "includ[es] any interconnection agreement

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[3209] We note section 22.903(d) of our rules, which remains in effect, requires the BOCs to file with us their interconnection agreements with their affiliated cellular providers. 47 C.F.R. § 22.903(d).

negotiated before the date of enactment . . . ." [3210] We conclude that this language demonstrates that Congress intended 252(i) to apply to agreements negotiated prior to enactment of the 1996 Act and approved by the state commission pursuant to section 252(e), as well as those approved under the seciton 251/252 negotiation process. Accordingly, we find that agreements negotiated prior to enactment of the 1996 Act must be disclosed publicly, and be made available to requesting telecommunications carriers pursuant to section 252(i).

1323. We also find that section 252(i) applies to interconnection agreements between adjacent, incumbent LECs. We note that section 252(i) requires a local exchange carrier to make available to requesting telecommunications carriers "any interconnection service, or network element *provided under an agreement approved under this section* . . . ." [3211] The plain meaning of this section is that any interconnection agreement approved by a state commission, including one between adjacent LECs, must be made available to requesting carriers pursuant to section 252(i). Requiring availability of such agreements will provide new entrants with a realistic benchmark upon which to base negotiations, and this will further the Congressional purpose of increasing competition. As stated in Section III of this Order, adjacent, incumbent LECs will be given an opportunity to renegotiate such agreements before they become subject to section 252(i)'s requirements. In Section III, we also consider, and reject, the Rural Tel. Coalition's argument that making agreements between adjacent, non-competing LECs available under section 252 will have a detrimental effect on small, rural carriers. *See* Section III, *supra*.

[3210] 47 U.S.C. § 252(a)(1).

[3211] 47 U.S.C. § 252(i) (emphasis supplied).

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APPENDIX B—Final Rules

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

1. Part 1 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 1—PRACTICE AND PROCEDURE

2. The table of contents of part 1 is revised to read as follows:

Subpart J—Pole Attachment Complaint Procedures

1.1401 Purpose.
1.1402 Definitions.
1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay.
1.1404 Complaint.
1.1405 File numbers.
1.1406 Dismissal of complaints.
1.1407 Response and reply.
1.1408 Number of copies and form of pleadings.
1.1409 Commission consideration of the complaint.
1.1410 Remedies.
1.1411 Meetings and hearings.
1.1412 Enforcement.
1.1413 Forfeiture.
1.1414 State certification.
1.1415 Other orders.
1.1416 Imputation of rates; modification costs.

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3. The authority citation for part 1 is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 154, 251, 252, 303, and 309(j) unless otherwise noted.

4. Section 1.1401 is revised to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable.

5. Section 1.1402 is amended by revising paragraph (d) to read as follows:

§ 1.1402 Definitions.

* * * *

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable.

* * * *

6. Section 1.1403 is amended by retitling the section, by amending paragraphs (a) and (b) and redesignating them as paragraphs (c) and (d), respectively, and by adding new paragraphs (a) and (b) to read as follows:

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons for lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to: (1) removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's of telecommunications carrier's pole attachment agreement, or (2) any increase in pole attachment rates; or (3) any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b) of this subpart. The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.

7. Section 1.1404 is amended by revising paragraphs (b) and (c) and by adding new paragraph (k) to read as follows:

§ 1.1404 Complaint.

* * * *

(b) The complaint shall be accompanied by a certification of service on the named respondent, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or respondent.

(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

* * * *

(k) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. § 224(f), the complaint shall be filed within 30 days of such denial. In addition to meeting the other requirements of this section, the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;

(2) The basis for the complainant's claim that the denial of access is improper;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way;

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a *prima facie* case.

8. Section 1.1409 is amended by revising paragraphs (b) and (d) to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * *

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a uitlity argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

* * * *

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

* * * *

9. Section 1.1416 is amended by retitling the section and by amending paragraph (b) to read as follows:

§ 1.1416 Imputation of rates; modification costs.

* * * *

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the pre-

ceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

10. Part 20 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

11. The authority citation for part 20 is revised to read as follows:

AUTHORITY: Secs. 4, 251-2, 303, and 332, 48 Stat. 1066, 1062, as amended; 47 U.S.C. 154, 251-4, 303, and 332 unless otherwise noted.

12. Section 20.11 is amended by adding paragraph (c) to read as follows:

§ 20.11 Interconnection to facilities of local exchange carriers.

* * * * *

(c) Local exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51 of this chapter.

13. Part 51 of Title 47 of the Code of Federal Regulations (C.F.R.) is added to read as follows:

PART 51—INTERCONNECTION

Subpart A—General information

Sec.
51.1 Basis and purpose.
51.3 Applicability to negotiated agreements.
51.5 Terms and definitions.

Subpart B—Telecommunications carriers

51.100 General duty.

Subpart C—Obligations of all local exchange carriers

51.201 Resale.
51.203 Number portability.
51.219 Access to rights of way.
51.221 Reciprocal compensation.
51.223 Application of additional requirements.

Subpart D—Additional obligations of incumbent local exchange carriers

51.301 Duty to negotiate.
51.303 Preexisting agreements.
51.305 Interconnection.
51.307 Duty to provide access on an unbundled basis to network elements.
51.309 Use of unbundled network elements.
51.311 Nondiscriminatory access to unbundled network elements.
51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.
51.315 Combination of unbundled network elements.
51.317 Standards for identifying network elements to be made available.
51.319 Specific unbundling requirements.
51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.
51.323 Standards for physical collocation and virtual collocation.

Subpart E—Exemptions, suspensions, and modifications of section 251 of the Act.

51.401 State authority.
51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.
51.405 Burden of proof.

Subpart F—Pricing of interconnection and unbundled elements

51.501 Scope.
51.503 General pricing standard.
51.505 Forward-looking economic cost.
51.507 General rate structure standard.
51.509 Rate structure standards for specific elements.
51.511 Forward-looking economic cost per unit.
51.513 Proxies for forward-looking economic cost.
51.515 Application of access charges.

Subpart G—Resale

51.601 Scope of resale rules.
51.603 Resale obligation of all local exchange carriers.
51.605 Additional obligations of incumbent local exchange carriers.
51.607 Wholesale pricing standard.
51.609 Determination of avoided retail costs.
51.611 Interim wholesale rates.
51.613 Restrictions on resale.
51.615 Withdrawal of services.
51.617 Assessment of end user common line charge on resellers.

Subpart H—Reciprocal compensation for transport and termination of local telecommunications traffic

51.701 Scope of transport and termination pricing rules.
51.703 Reciprocal compensation obligation of LECs.
51.705 Incumbent LECs' rates for transport and termination.
51.707 Default proxies for incumbent LECs' transport and termination rates.
51.709 Rate structure for transport and termination.
51.711 Symmetrical reciprocal compensation.
51.713 Bill-and-keep arrangements for reciprocal compensation.

51.715 Interim transport and termination pricing.
51.717 Renegotiation of existing non-reciprocal arrangements.

Subpart I—Procedures for implementation of section 252 of the Act.

51.801 Commission action upon a state commission's failure to act to carry out its responsibility under section 252 of the Act.
51.803 Procedures for Commission notification of state commission's failure to act.
51.805 The Commission's authority over proceedings and matters.
51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.
51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.

AUTHORITY: Sections 1-5, 7, 201-05, 225-27, 251-54, 271, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 218, 225-27, 251-54, 271, unless otherwise noted.

Subpart A—General Information.

§ 51.1 Basis and purpose.

(a) *Basis.* These rules are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose.* The purpose of these rules is to implement sections 251 and 252 of the Communicaitons Act of 1934, as amended, 47 U.S.C. 251 and 252.

§ 51.3 Applicability to negotiated agreements.

To the extent provided in section 252(e)(2)(A) of the Act, a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part.

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

Act. The Communications Act of 1934, as amended.

Advanced intelligent network. "Advanced Intelligent Network" is a telecommunications network architecture in which call processing, call routing, and network management are provided by means of centralized databases located at points in an incumbent local exchange carrier's network.

Arbitration, final offer. "Final offer arbitration" is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator selects, without modification, one of the final offers by the parties to the arbitration or portions of both such offers. "Entire package final offer arbitration," is a procedure under which the arbitrator must select, without modification, the entire proposal submitted by one of the parties to the arbitration. "Issue-by-issue final offer arbitration," is a procedure under which the arbitrator must select, without modification, on an issue-by-issue basis, one of the proposals submitted by the parties to the arbitration.

Billing. "Billing" involves the provision of appropriate usage data by one telecommunications carrier to another to facilitate customer billing with attendant acknowledgements and status reports. It also involves the exchange of information between telecommunications carriers to process claims and adjustments.

Commercial Mobile Radio Service (CMRS). "CMRS" has the same meaning as that term is defined in § 20.3 of this chapter.

Commission. "Commission" refers to the Federal Communications Commission.

Directory assistance service. "Directory assistance service" includes, but is not limited to, making available to

customers, upon request, information contained in directory listings.

Directory listings. "Directory listings" are any information: (1) identifying the listed names of subscribers of a telecommunications carrier and such subscriber's telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses or classifications; and (2) that the telecommunications carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

Downstream database. A "downstream database" is a database owned and operated by an individual carrier for the purpose of providing number portability in conjunction with other functions and services.

Equipment necessary for interconnection or access to unbundled network elements. For purposes of section 251 (c)(2) of the Act, the equipment used to interconnect with an incumbent local exchange carrier's network for the transmission and routing of telephone exchange service, exchange access service, or both. For the purposes of section 251(c)(3) of the Act, the equipment used to gain access to an incumbent local exchange carrier's unbundled network elements for the provision of a telecommunications service.

Incumbent Local Exchange Carrier (Incumbent LEC). With respect to an area, the local exchange carrier that: (1) on February 8, 1996, provided telephone exchange service in such area; and (2)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this chapter; or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i) of this paragraph.

Interconnection. "Interconnection" is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

Local Exchange Carrier (LEC). A "LEC" is any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of the Act, except to the extent that the Commission finds that such service should be included in the definition of the such term.

Maintenance and repair. "Maintenance and repair" involves the exchange of information between telecommunications carriers where one initiates a request for maintenance or repair of existing products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports.

Meet point. A "meet point" is a point of interconnection between two networks, designated by two telecommunications carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

Meet point interconnection arrangement. A "meet point interconnection arrangement" is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point.

Network element. A "network element" is a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

Operator services. "Operator services" are any automatic or live assistance to a consumer to arrange for billing or completion of a telephone call. Such services include, but are not limited to, busy line verification, emergency interrupt, and operator-assisted directory assistance services.

Physical collocation. "Physical collocation" is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) place its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises;

(2) use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or to gain access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service;

(3) enter those premises, subject to reasonable terms and conditions, to install, maintain, and repair equipment necessary for interconnection or access to unbundled elements; and

(4) obtain reasonable amounts of space in an incumbent LEC's premises, as provided in this part, for the equipment necessary for interconnection or access to unbundled elements, allocated on a first-come, first-served basis.

Premises. "Premises" refers to an incumbent LEC's central offices and serving wire centers, as well as all buildings or similar structures owned or leased by an incumbent LEC that house its network facilities, and all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures.

Pre-ordering and ordering. "Pre-ordering and ordering" includes the exchange of information between telecommu-

nications carriers about current or proposed customer products and services or unbundled network elements or some combination thereof.

Provisioning. "Provisioning" involves the exchange of information between telecommunications carriers where one executes a request for a set of products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports.

Rural telephone company. A "rural telephone company" is a LEC operating entity to the extent that such entity:

(1) provides common carrier service to any local exchange carrier study area that does not include either:

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(2) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(3) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(4) has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.

Service control point. A "service control point" is a computer database in the public switched network which contains information and call processing instructions needed to process and complete a telephone call.

Service creation environment. A "service creation environment" is a computer containing generic call processing software that can be programmed to create new advanced intelligent network call processing services.

Signal transfer point. A "signal transfer point" is a packet switch that acts as a routing hub for a signaling network and transfers messages between various points in and among signaling networks.

State commission. A "state commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers. As referenced in this part, this term may include the Commission if it assumes the responsibility of the state commission, pursuant to section 252(e)(5) of the Act. This term shall also include any person or persons to whom the state commission has delegated its authority under section 251 and 252 of the Act.

State proceeding. A "state proceeding" is any administrative proceeding in which a state commission may approve or prescribe rates, terms, and conditions including, but not limited to, compulsory arbitration pursuant to section 252(b) of the Act, review of a Bell operating company statement of generally available terms pursuant section 252(f) of the Act, and a proceeding to determine whether to approve or reject an agreement adopted by arbitration pursuant to section 252(e) of the Act.

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there

is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

Telecommunications carrier. A "telecommunications carrier" is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of the Act). A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage. This definition includes CMRS providers, interexchange carriers (IXCs) and, to the extent they are acting as telecommunications carriers, companies that provide both telecommunications and information services. Private Mobile Radio Service providers are telecommunications carriers to the extent they provide domestic or international telecommunications for a fee directly to the public.

Virtual collocation. "Virtual collocation" is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) designate or specify equipment to be used for interconnection or access to unbundled network elements to be located within or upon an incumbent LEC's premises, and dedicated to such telecommunications carrier's use;

(2) use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and

routing of telephone exchange service, exchange access service, or both, or for access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service; and

(3) electronically monitor and control its communications channels terminating in such equipment.

Subpart B—Telecommunications Carriers.

§ 51.100 General duty.

(a) Each telecommunications carrier has the duty:

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) to not install network features, functions, or capabilities that do not comply with the guidelines and standards as provided in the Commission's rules or section 255 or 256 of the Act.

(b) A telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

Subpart C—Obligations of All Local Exchange Carriers.

§ 51.201 Resale.

The rules governing resale of services by an incumbent LEC are set forth in subpart G of this part.

§ 51.203 Number portability.

The rules governing number portability are set forth in part 52, subpart C of this chapter.

§ 51.219 Access to rights of way.

The rules governing access to rights of way are set forth in part 1, subpart J of this chapter.

§ 51.221 Reciprocal compensation.

The rules governing reciprocal compensation are set forth in subpart H of this part.

§ 51.223 Application of additional requirements.

(a) A state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act, unless the Commission issues an order declaring that such LECs or classes or categories of LECs should be treated as incumbent LECs.

(b) A state commission, or any other interested party, may request that the Commission issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs, pursuant to section 251(h)(2) of the Act. Subpart D—Additional Obligations of Incumbent Local Exchange Carriers.

§ 51.301 Duty to negotiate.

(a) An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act.

(b) A requesting telecommunications carrier shall negotiate in good faith the terms and conditions of agreements described in paragraph (a) of this section.

(c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:

(1) demanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission, or in support of a request for arbitration under section 252(b)(2)(B) of the Act;

(2) demanding that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law;

(3) refusing to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules;

(4) conditioning negotiation on a requesting telecommunications carrier first obtaining state certifications;

(5) intentionally misleading or coercing another party into reaching an agreement that it would not otherwise have made;

(6) intentionally obstructing or delaying negotiations or resolutions of disputes;

(7) refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and

(8) refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:

(i) refusal by an incumbent LEC to furnish information about its network that a requesting telecommunications carrier reasonably requires to identify the network elements that it needs in order to serve a particular customer; and

(ii) refusal by a requesting telecommunications carrier to furnish cost data that would be relevant to setting rates if the parties were in arbitration.

§ 51.303 Preexisting agreements.

(a) All interconnection agreements between an incumbent LEC and a telecommunications carrier, including those negotiated before February 8, 1996, shall be submitted by the parties to the appropriate state commission for approval pursuant to section 252(e) of the Act.

(b) Interconnection agreements negotiated before February 8, 1996, between Class A carriers, as defined by § 32.11(a)(1) of this chapter, shall be filed by the parties with the appropriate state commission no later than June 30, 1997, or such earlier date as the state commission may require.

(c) If a state commission approves a preexisting agreement, it shall be made available to other parties in accordance with section 252(i) of the Act and § 51.809 of this part. A state commission may reject a preexisting agreement on the grounds that it is inconsistent with the public interest, or for other reasons set forth in section 252(e)(2)(A) of the Act.

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) for the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) at any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) the line-side of a local switch;

(ii) the trunk-side of a local switch;

(iii) the trunk interconnection points for a tandem switch;

(iv) central office cross-connect points;

(v) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) the points of access to unbundled network elements as described in § 51.319 of this part;

(3) that is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party, except as provided in paragraph (4) of this section. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier;

(4) that, if so requested by a telecommunications carrier and to the extent technically feasible, is superior in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the incumbent LEC provides interconnection. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier; and

(5) on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to

receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnecton at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

§ 51.307 Duty to provide access on an unbundled basis to network elements.

(a) An incumbent LEC shall provide, to a requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules.

(b) The duty to provide access to unbundled network elements pursuant to section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled

network element independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act.

(c) An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.

(d) An incumbent LEC shall provide a requesting telecommunications carrier access to the facility or functionality of a requested network element separate from access to the facility or functionality of other network elements, for a separate charge.

§ 51.309 Use of unbundled network elements.

(a) An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

(b) A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.

(c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.

§ 51.311 Nondiscriminatory access to unbundled net-network elements.

(a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element, except as provided in paragraph (c) of this section.

(b) Except as provided in paragraph (c) of this section, to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

(c) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element or access to such unbundled network element at the requested level of quality that is superior to that which the incumbent LEC provides to itself. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at

the sole request of the requesting telecommunications carrier.

(d) Previous successful access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities .

(e) Previous successful provision of access to an unbundled element at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

§ 51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision and unbundled network elements.

(a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

(c) An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

§ 51.315 Combination of unbundled network elements.

(a) An incumbent LEC shall provide unbundled network elements in a manner that allows requestig telecommunications carriers to combine such network elements in order to provide a telecommunications service.

(b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) technically feasible; and

(2) would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

§ 51.317 Standards for identifying network elements to be made available.

(a) In determining what network elements should be made available for purposes of section 251(c)(3) of the

Act beyond those identified in § 51.319 of this part, a state commission shall first determine whether it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis.

(b) If the state commission determines that it is technically feasible for the incumbent LEC to provide access to the network element on an unbundled basis, the state commission may decline to require unbundling of the network element only if:

(1) the state commission concludes that:

(i) the network element is proprietary, or contains proprietary information that will be revealed if the network element is provided on an unbundled basis; and

(ii) a requesting telecommunications carrier could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled network elements within the incumbent LEC's network; or

(2) the state commission concludes that the failure of the incumbent LEC to provide access to the network element would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer, compared with providing that service over other unbundled network elements in the incumbent LEC's network.

§ 51.319 Specific unbundled requirements.

An incumbent LEC shall provide nondiscriminatory access in accordance with § 51.311 of this part and section 251(c)(3) of the Act to the following network elements on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service:

(a) *Local Loop.* The local loop network element is defined as a transmission facility between a distribution

frame (or its equivalent) in an incumbent LEC central office and an end user customer premises;

(b) *Network Interface Device.*

(1) The network interface device network element is defined as a cross-connect device used to connect loop facilities to inside wiring.

(2) An incumbent LEC shall permit a requesting telecommunications carrier to connect its own local loops to the inside wiring premises through the incumbent LEC's network interface device. The requesting telecommunications carrier shall establish this connection through an adjoining network interface device deployed by such telecommunications carrier;

(c) *Switching Capability.*

(1) Local Switching Capabality

(i) The local switching capability network element is defined as:

(A) line-side facilities, which include, but are not limited to, the connection between a loop termination at a main distribuiton frame and a switch line card;

(B) trunk-side facilities, which include, but are not limited to, the connection between trunk termination at a trunk-side cross-connect panel and a switch trunk card;

(C) all features, functions, and capabilities of the switch, which include, but are not limited to:

(*1*) the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to the incumbent LEC's customers, such as a telephone number, white page listing, and dial tone; and

(*2*) all other features that the switch is capable of providing, including but not limited to custom calling, custom local area signaling service features, and Centrex,

as well as any technically feasible customized routing functions provided by the switch.

(ii) An incumbent LEC shall transfer a customer's local service to a competing carrier within a time period no greater than the interval within which the incumbent LEC currently transfers end users between interexchange carriers, if such transfer requires only a change in the incumbent LEC's software;

(2) Tandem Switching Capability. The tandem switching capability network element is defined as:

(i) trunk-connect facilities, including but not limited to the connection between trunk termination at a cross-connect panel and a switch trunk card;

(ii) the basic switching function of connecting trunks to trunks; and

(iii) the functions that are centralized in tandem switches (as distinguished from separate end-office switches), including but not limited to call recording, the routing of calls to operator services, and signaling conversion features;

(d) *Interoffice Transmission Facilities.*

(1) Interoffice transmission facilities are defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers.

(2) The incumbent LEC shall:

(i) provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;

(ii) provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;

(iii) permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities; and

(iv) permit, to the extent technically feasible, a requesting telecommunications carrier to obtain the functionality provided by the incumbent LEC's digital cross-connect systems in the same manner that the incumbent LEC provides such functionality to interchange carriers;

(e) *Signaling Networks and Call-Related Databases.*

(1) Signaling Networks.

(i) Signaling networks include, but are not limited to, signaling links and signaling transfer points.

(ii) When a requesting telecommunications carrier purchases unbundled switching capability from an incumbent LEC, the incumbent LEC shall provide access to its signaling network from that switch in the same manner in which it obtains such access itself.

(iii) An incumbent LEC shall provide a requesting telecommunications carrier with its own switching facilities access to the incumbent LEC's signaling network for each of the requesting telecommunications carrier's switches. This connection shall be made in the same manner as an incumbent LEC connects one of its own switches to a signal transfer point.

(iv) Under this paragraph, an incumbent LEC is not required to unbundle those signaling links that connect service control points to switching transfer points or to

permit a requesting telecommunications carrier to link its own signal transfer points directly to the incumbent LEC's switch or call-related databases;

(2) Call-Related Databases.

(i) Call-related databases are defined as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of a telecommunications service.

(ii) For purposes of switch query and database response through a signaling network, an incumbent LEC shall provide access to its call-related databases, including, but not limited to, the Line Information Database, Toll Free Calling database, downstream number portability databases, and Advanced Intelligent Network databases, by means of physical access at the signaling transfer point linked to the unbundled database.

(iii) An incumbent LEC shall allow a requesting telecommunications carrier that has purchased an incumbent LEC's local switching capability to use the incumbent LEC's service control point element in the same manner, and via the same signaling links, as the incumbent LEC itself.

(iv) An incumbent LEC shall allow a requesting telecommunications carrier that has deployed its own switch, and has linked that switch to an incumbent LEC's signaling system, to gain access to the incumbent LEC's service control point in a manner that allows the requesting carrier to provide any call-related, database-supported services to customers served by the requesting telecommunications carrier's switch.

(v) A state commission shall consider whether mechanisms mediating access to an incumbent LEC's Advanced Intelligent Network service control points are necessary,

and if so, whether they will adequately safeguard against intentional or unintentional misuse of the incumbent LEC's Advanced Intelligent Network facilities.

(vi) An incumbent LEC shall provide a requesting telecommunications carrier with access to caller-related data-bases in a manner that complies with section 222 of the Act;

(3) Service Management Systems.

(A) A service management system is defined as a computer database or system not part of the public switched network that, among other things:

(1) interconnects to the service control point and sends to that service control point the information and call processing instructions needed for a network switch to process and complete a telephone call; and

(2) provides telecommunications carriers with the capability of entering and storing data regarding the processing and completing of a telephone call.

(B) An incumbent LEC shall provide a requesting telecommunications carrier with the information necessary to enter correctly, or format for entry, the information relevant for input into the particular incumbent LEC service management system.

(C) An incumbent LEC shall provide a requesting telecommunications carrier the same access to design, create, test, and deploy Advanced Intelligent Network-based services at the service management system, through a service creation environment, that the incumbent LEC provides to itself.

(D) A state commission shall consider whether mechanisms mediating access to Advanced Intelligent Network service management systems and service creation environments are necessary, and if so, whether they will adequately safeguard against intentional or unintentional misuse of the incumbent LEC's Advanced Intelligent Network facilities.

(E) An incumbent LEC shall provide a requesting telecommunications carrier access to service management systems in a manner that complies with section 222 of the Act;

(f) *Operations Support Systems Functions.*

(1) Operations support systems functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information.

(2) An incumbent LEC that does not currently comply with this requirement shall do so as expeditiously as possible, but, in any event, no later than January 1, 1997; and

(g) *Operator Services and Directory Assistance.* An incumbent LEC shall provide access to operator service and directory assistance facilities where technically feasible.

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point of an incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations.

(g) An incumbent LEC that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall con-

tinue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§ 64.1401, 64.1402, 69.121 of this chapter, and the Commission's other requirements.

§ 51.323 Standards for physical collocation and virtual collocation.

(a) An incumbent LEC shall provide physical collocation and virtual collocation to requesting telecommunications carriers.

(b) An incumbent LEC shall permit the collocation of any type of equipment used for interconnection or access to unbundled network elements. Whenever an incumbent LEC objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC must prove to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements includes, but is not limited to:

(1) transmission equipment including, but not limited to, optical terminating equipment and multiplexers; and

(2) equipment being collocated to terminate basic transmission facilities pursuant to §§ 64.1401 and 64.1402 of this chapter as of August 1, 1996.

(c) Nothing in this section requires an incumbent LEC to permit collocation of switching equipment or equipment used to provide enhanced services.

(d) When an incumbent LEC provides physical collocation, virtual collocation, or both, the incumbent LEC shall:

(1) provide an interconnection point or points, physically accessible by both the incumbent LEC and the collocating telecommunications carrier, at which the fiber optic cable carrying an interconnector's circuits can enter

the incumbent LEC's premises, provided that the incumbent LEC shall designate interconnection points as close as reasonably possible to its premises;

(2) provide at least two such interconnection points at each incumbent LEC premises at which there are at least two entry points for the incumbent LEC's cable facilities, and at which space is available for new facilities in at least two of those entry points;

(3) permit interconnection of copper or coaxial cable if such interconnection is first approved by the state commission; and

(4) permit physical collocation of microwave transmission facilities except where such collocation is not practical for technical reasons or because of space limitations, in which case virtual collocation of such facilities is required where technically feasible.

(e) When providing virtual collocation, an incumbent LEC shall, at a minimum, install, maintain, and repair collocated equipment identified in paragraph (b) of this section within the same time periods and with failure rates that are no greater than those that apply to the performance of similar functions for comparable equipment of the incumbent LEC itself.

(f) An incumbent LEC shall allocate space for the collocation of the equipment identified in paragraph (b) of this section in accordance with the following requirements:

(1) an incumbent LEC shall make space available within or on its premises to requesting telecommunications carrier on a first-come, first-served basis, provided, however, that the incumbent LEC shall not be required to lease or construct additional space to provide for physical collocation when existing space has been exhausted;

(2) to the extent possible, an incumbent LEC shall make contiguous space available to requesting telecommunications carriers that seek to expand their existing collocation space;

(3) when planning renovations of existing facilities or constructing or leasing new facilities, an incumbent LEC shall take into account projected demand for collocation of equipment;

(4) an incumbent LEC may retain a limited amount of floor space for its own specific future uses, provided, however, that the incumbent LEC may not reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future use;

(5) an incumbent LEC shall relinquish any space held for future use before denying a request for virtual collocation on the grounds of space limitations, unless the incumbent LEC proves to the state commission that virtual collocation at that point is not technically feasible; and

(6) an incumbent LEC may impose reasonable restrictions on the warehousing of unused space by collocating telecommunications carriers, provided, however, that the incumbent LEC shall not set maximum space limitations applicable to such carriers unless the incumbent LEC proves to the state commission that space constraints make such restrictions necessary.

(g) An incumbent LEC shall permit collocating telecommunications carriers to collocate equipment and connect such equipment to unbundled network transmission elements obtained from the incumbent LEC, and shall not require such telecommunications carriers to bring their own transmission facilities to the incumbent LEC's premises in which they seek to collocate equipment.

(h) An incumbent LEC shall permit collocating telecommunications carrier to interconnect its network with

that of another collocating telecommunications carrier at the incumbent LEC's premises and to connect its collocated equipment to the collocated equipment of another telecommunications carrier within the same premises provided that the collocated equipment is also used for interconnection with the incumbent LEC or for access to the incumbent LEC's unbundled network elements.

(1) An incumbent LEC shall provide the connection between the equipment in the collocated spaces of two or more telecommunications carriers, unless the incumbent LEC permits one or more of the collocating parties to provide this connection for themselves; and

(2) An incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space.

(i) An incumbent LEC may require reasonable security arrangements to separate a collocating telecommunicatons carrier's space from the incumbent LEC's facilities.

(j) An incumbent LEC shall permit a collocating telecommunications carrier to subcontract the construction of physical collocation arrangements with contractors approved by the incumbent LEC, provided, however, that the incumbent LEC shall not unreasonably withhold approval of contractors. Approval by an incumbent LEC shall be based on the same criteria it uses in approving contractors for its own purposes.

Subpart E—Exemptions, Suspensions, and Modifications of Requirements of Section 251 of the Act.

§ 51.401 State authority.

A state commission shall determine whether a telephone company is entitled, pursuant to section 251(f) of the Act, to exemption from, or suspension or modification of,

the requirements of section 251 of the Act. Such determinations shall be made on a case-by-case basis.

§ 51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.

A LEC is not eligible for a suspension or modification of the requirements of section 251(b) or section 251(c) of the Act pursuant to section 251(f)(2) of the Act if such LEC, at the holding company level, has two percent or more of the subscriber lines installed in the aggregate nationwide.

§ 51.405 Burden of proof.

(a) Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commisison that the rural telephone company should be entitled, pursuant to section 251(f)(1) of the Act, to continued exemption from the requirements of section 251(c) of the Act.

(b) A LEC with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide must prove to the state commission, pursuant to section 251(f)(2) of the Act, that it is entitled to a suspension or modification of the application of a requirement or requirements of section 251(b) or 251(c) of the Act.

(c) In order to justify continued exemption under section 251(f)(1) of the Act once a bona fide request has been made, an incumbent LEC must offer evidence that the application of the requirements of section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

(d) In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue

economic burden beyond the economic burden that is typically associated with efficient competitive entry.

Subpart F—Pricing of Elements.

§ 51.501 Scope.

(a) The rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation.

(b) As used in this subpart, the term "element" includes network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements.

§ 51.503 General pricing standard.

(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

(b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509 of this part, and shall be established, at the election of the state commission—

(1) pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511 of this part; or

(2) consistent with the proxy ceilings and ranges set forth in § 51.513 of this part.

(c) The rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide.

§ 51.505 Forward-looking economic cost.

(a) *In general.* The forward-looking economic cost of an element equals the sum of:

(1) the total element long-run incremental cost of the element, as described in paragraph (b); *and*

(2) a reasonable allocation of forward-looking common costs, as described in paragraph (c).

(b) *Total element long-run incremental cost.* The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.

(1) *Efficient network configuration.* The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

(2) *Forward-looking cost of capital.* The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

(3) *Depreciation rates.* The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

(c) *Reasonable allocation of forward-looking common costs.*

(1) *Forward-looking common costs.* Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent

LEC) that cannot be attributed directly to individual elements or services.

(2) *Reasonable allocation.*

(A) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(B) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered.

(d) *Factors that may not be considered.* The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) *Embedded costs.* Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts.

(2) *Retail costs.* Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609 of this part.

(3) *Opportunity costs.* Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carrier that purchase elements.

(4) *Revenues to subsidize other services.* Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

(e) *Cost study requirements.* An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511 of this part.

(1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in § 51.513 of this part only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and § 51.511 of this part in a state proceeding that meets the requirements of paragraph (e)(2) of this section.

(2) Any state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any State proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.

§ 51.507 General rate structure standard.

(a) Element rates shall be structured consistently with the manner in which the costs of providing the elements are incurred.

(b) The costs of dedicated facilities shall be recovered through flat-rated charges.

(c) The costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users. Costs of shared facilities may be apportioned either through usage-sensitive charges or capacity-based flat-

rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users.

(d) Recurring costs shall be recovered through recurring charges, unless an incumbent LEC proves to a state commission that such recurring costs are de minimis. Recurring costs shall be considered de minimis when the costs of administering the recurring charge would be excessive in relation to the amount of the recurring costs.

(e) State commissions may, where reasonable, require incumbent LECs to recover nonrecurring costs through recurring charges over a reasonable period of time. Nonrecurring charges shall be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element.

(f) State commissions shall establish different rates for elements in at least three defined geographic areas within the state to reflect geographic cost differences.

(1) To establish geographically-deaveraged rates, state commissions may use existing density-related zone pricing plans described in § 69.123 of this chapter, or other such cost-related zone plans established pursuant to state law.

(2) In states not using such existing plans, state commissions must create a minimum of three cost-related rate zones.

§ 51.509 Rate structure standards for specific elements.

In addition to the general rules set forth in § 51.507 of this part, rates for specific elements shall comply with the following rate structure rules.

(a) *Local loops.* Loop costs shall be recovered through flat-rated charges.

(b) *Local switching.* Local switching costs shall be recovered through a combination of a flat-rated charge for

line ports and one or more flat-rated or per-minute usage charges for the switching matrix and for trunk ports.

(c) *Dedicated transmission links.* Dedicated transmission link costs shall be recovered through flat-rated charges.

(d) *Shared transmission facilities between tandem switches and end offices.* The costs of shared transmission facilities between tandem switches and end offices may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

(e) *Tandem switching.* Tandem switching costs may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

(f) *Signaling and call-related database services.* Signaling and call-related database service costs shall be usage-sensitive, based on either the number of queries or the number of messages, with the exception of the dedicated circuits known as signaling links ,the cost of which shall be recovered through flat-rated charges.

(g) *Collocation.* Collocation costs shall be recovered consistent with the rate structure policies established in the *Expanded Interconnection* proceeding, CC Docket No. 91-141.

§ 51.511 Forward-looking economic cost per unit.

(a) The forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, as defined in § 51.505 of this part, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period.

(b)(1) With respect to elements that an incumbent LEC offers on a flat-rate basis, the number of units is defined as the discrete number of elements (*e.g.*, local loops or local switch ports) that the incumbent LEC uses or provides.

(2) With respect to elements that an incumbent LEC offers on a usage-sensitive basis, the number of units is defined as the unit of measurement of the usage (*e. g.*, minutes of use or call-related database queries) of the element.

§ 51.513 Proxies for forward-looking economic cost.

(a) A state commission may determine that the cost information available to it with respect to one or more elements does not support the adoption of a rate or rates that are consistent with the requirements set forth in §§ 51.505 and 51.511 of this part. In that event, the state commission may establish a rate for an element that is consistent with the proxies specified in this section, provided that:

(1) any rate established through use of such proxies shall be superseded once the state commission has completed review of a cost study that complies with the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511 of this part, and has concluded that such study is a reasonable basis for establishing element rates; and

(2) the state commission sets forth in writing a reasonable basis for its selection of a particular rate for the element.

(b) The constraints on proxy-based rates described in this section apply on a geographically averaged basis. For purposes of determining whether geographically deaveraged rates for elements comply with the provisions of this section, a geographically averaged proxy-based rate shall be computed based on the weighted average of the actual,

geographically deaveraged rates that apply in separate geographic areas in a state.

(c) *Proxies for specific elements.*

(1) *Local loops.* For each state listed below, the proxy-based monthly rate for unbundled local loops, on a statewide weighted average basis, shall be no greater than the figures listed in the table below. (The Commission has not established a default proxy ceiling for loop rates in Alaska).

TABLE A

State	Proxy Ceiling	State	Proxy Ceiling
Alabama	$17.25	Nebraska	$18.05
Arizona	$12.85	Nevada	$18.95
Arkansas	$21.18	New Hampshire	$16.00
California	$11.10	New Jersey	$12.47
Colorado	$14.97	New Mexico	$18.66
Connecticut	$13.23	New York	$11.75
Delaware	$13.24	North Carolina	$16.71
District of Columbia	$10.81	North Dakota	$25.36
Florida	$13.68	Ohio	$15.73
Georgia	$16.09	Oklahoma	$17.63
Hawaii	$15.27	Oregon	$15.44
Idaho	$20.16	Pennsylvania	$12.30
Illinois	$13.12	Puerto Rico	$12.47
Indiana	$13.29	Rhode Island	$11.48
Iowa	$15.94	South Carolina	$17.07
Kansas	$19.85	South Dakota	$25.33
Kentucky	$16.70	Tennessee	$17.41
Louisiana	$16.98	Texas	$15.49
Maine	$18.69	Utah	$15.12
Maryland	$13.36	Vermont	$20.13
Massachusetts	$9.83	Virginia	$14.13
Michigan	$15.27	Washington	$13.37
Minnesota	$14.81	West Virginia	$19.25
Mississippi	$21.97	Wisconsin	$15.94
Missouri	$18.32	Wyoming	$25.11
Montana	$25.18		

(2) *Local switching.* The blended proxy-based rate for unbundled local switching shall be no greater than 0.4 cents ($0.004) per minute, and no less than 0.2 cents ($0.002) per minute, except that, where a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents ($0.005) per minute, that rate may be retained pending completion of a forward-looking ecnomic cost study. The blended rate for unbundled local switching shall be calculated as the sum of the following:

(A) the applicable flat-rated charges for subelements associated with unbundled local switching, such as line ports, divided by the projected average minutes of use per flat-rated subelement; and

(B) the applicable usage-sensitive charges for subelements associated with unbundled local switching, such as switching and trunk ports. A weighted average of such charges shall be used in appropriate circumstances, such as when peak and off-peak charges are used.

(3) *Dedicated transmission links.* The proxy-based rates for dedicated transmission links shall be no greater than the incumbent LEC's tariffed interstate charges for comparable entrance facilities or direct-trunked transport offerings, as described in §§ 69.110 and 69.112 of this chapter.

(4) *Shared transmission facilities between tandem switches and end offices.* The proxy-based rates for shared transmission facilities between tandem switches and end offices shall be no greater than the weighted per-minute equivalent of DS1 and DS3 interoffice dedicated transmission link rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the poportion of copper and fiber facilities in the interoffice network), calculated using a loading factor of 9,000 minutes per month per voice-grade circuit, as described in § 69.112 of this chapter.

(5) *Tandem switching.* The proxy-based rate for tandem switching shall be no greater than 0.15 cents ($0.0015) per minute of use.

(6) *Collocation.* To the extent that the incumbent LEC offers a comparable form of collocation in its interstate expanded interconnection tariffs, as described in §§ 64.1401 and 69.121 of this chapter, the proxy-based rates for collocation shall be no greater than the effective rates for equivalent services in the interstate expanded interconnection tariff. To the extent that the incumbent LEC does not offer a comparable form of collocation in its interstate expanded interconnection tariffs, a state commission may, in its discretion, establish a proxy-based rate, provided that the state commission sets forth in writing a reasonable basis for concluding that its rate would approximate the result of a forward-looking economic cost study, as described in § 51.505 of this part.

(7) *Signaling, call-related database, and other elements.* To the extent that the incumbent LEC has established rates for offerings comparable to other elements in its interstate access tariffs, and has provided cost support for those rates pursuant to § 61.49(h) of this chapter, the proxy-based rates for those elements shall be no greater that the effective rates for equivalent services in the interstate access tariffs. In other cases, the proxy-based rate shall be no greater than a rate based on direct costs plus a reasonable allocation of overhead loadings, pursuant to § 61.49(h) of this chapter.

§ 51.515 Application of access charges.

(a) Neither the interstate access charges described in part 69 nor comparable intrastate access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access services.

(b) Notwithstanding §§ 51.505, 51.511, and 51.513 (d)(2) of this part and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications car-

riers that purchase unbundled local switching elements, as described in § 51.319(c)(1) of this part, for interstate minutes of use traversing such unbundled local switching elements, the carrier common line charge described in § 69.105 of this chapter, and a charge equal to 75% of the interconnection charge described in § 69.124 of this chapter, only until the earliest of the following, and not thereafter:

(1) June 30, 1997;

(2) the later of the effective date of a final Commission decision in CC Docket No. 96-45, *Federal-State Joint Board on Universal Service,* or the effective date of a final Commission decision in a proceeding to consider reform of the interstate access charges described in part 69; or

(3) with respect to a Bell operating company only, the date on which that company is authorized to offer in-region interLATA service in a state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

(c) Notwithstanding §§ 51.505, 51.511 and 51.513 (d)(2) of this part and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications carriers that purchase unbundled local switching elements, as described in § 51.319(c)(1) of this part, for intrastate toll minutes of use traversing such unbundled local switching elements, intrastate access charges comparable to those listed in paragraph (b) and any explicit intrastate universal service mechanism based on access charges, only until the earliest of the following, and not thereafter:

(1) June 30, 1997;

(2) the effective date of a state commission decision that an incumbent LEC may not assess such charges; or

(3) with respect to a Bell operating company only, the date on which that company is authorized to offer in-region interLATA service in the state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer innerLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

Subpart G—Resale.

§ 51.601 Scope of resale rules.

The provisions of this subpart govern the terms and conditions under which LECs offer telecommunications services to requesting telecommunications carries for resale.

§ 51.603 Resale obligation of all local exchange carriers.

(a) A LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and nondiscriminatory.

(b) A LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.

§ 51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates that are at the election of the state commission—

(1) consistent with the avoided cost methodology described in §§ 51.607 and 51.609 of this part; or

(2) interim wholesale rates, pursuant to § 51.611 of this part,

(b) Except as provided in § 51.613 of this part, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

§ 51.607 Wholesale pricing standard.

(a) The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the incumbent LEC's existing retail rate for the telecommunications service, less avoided retail cots, as described in § 51.609 of this part.

(b) For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

§ 51.609 Determination of avoided retail costs.

(a) Except as provided in § 51.611 of this part, the amount of avoided retail costs shall be determined on the basis of a cost study that complies with the requirements of this section.

(b) Avoided retail costs shall be those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier.

(c) For incumbent LECs that are designated as Class A companies under § 32.11 of this chapter, except as provided in paragraph (d), avoided retail costs shall:

(1) include, as direct costs, the costs recorded in USOA accounts 6611 (product management), 6612 (sales), 6613 (product advertising), 6621 (call completion services), 6622 (number services), and 6623 (customer services) (§§ 32.6611, 32.6612, 32.6613, 32.6622, and 32.6623);

(2) include, as indirect costs, a portion of the costs recorded in USOA accounts 6121-6124 (general support expenses), 6612, 6711, 6721-6728 (corporate operations expenses) and 5301 (telecommunications uncollectibles) (§§ 32.6121-32.6124, 32.6612, 32.6711, 32.6721-32.6728, and 32.5301); and

(3) not include plant-specific expenses and plant nonspecific expenses, other than general support expenses (§§ 32.6110-32.6116, 32.6210-32.6565).

(d) Costs included in accounts 6611-6613 and 6621-6623 described in paragraph (c) (§§ 32.6611-32.6613 and 32.6621-32.6623) may be included in wholesale rates only to the extent that the incumbent LEC proves to a state commission that specific costs in these accounts will be incurred and are not avoidable with respect to services sold at wholesale, or that specific costs in these accounts are not included in the retail prices of resold services. Costs included in accounts 6110-6116 and 6210-6565 described in paragraph (c) (§§ 32.6110-32.6116, 32.6210-32.6565) may be treated as avoided retail costs, and excluded from wholesale rates, only to the extent that a party proves to a state commission that specific costs in these accounts can reasonably be avoided when an incumbent LEC provides a telecommunications service for resale to a requesting carrier.

(e) For incumbent LECs that are designated as Class B companies under § 32.11 of this chapter and that record information in summary accounts instead of specific USOA accounts, the entire relevant summary accounts may be used in lieu of the specific USOA accounts listed in paragraphs (c) and (d).

§ 51.611 Interim wholesale rates.

(a) If a state commission cannot, based on the information available to it, establish a wholesale rate using the

methodology prescribed in § 51.609 of this part, then the state commission may elect to establish an interim wholesale rate as described in paragraph (b) of this section.

(b) The state commission may establish interim wholesale rates that are at least 17 percent, and no more than 25 percent, below the incumbent LEC's existing retail rates, and shall articulate the basis for selecting a particular discount rate. The same discount percentage rate shall be used to establish interim wholesale rates for each telecommunications service.

(c) A state commission that establishes interim wholesale rates shall, within a reasonable period of time thereafter, establish wholesale rates on the basis of an avoided retail cost study that complies with § 51.609 of this part.

§ 51.613 Restrictions on resale.

(a) Notwithstanding § 51.605(b) of this part, the following types of restrictions on resale may be imposed:

(1) *Cross-class selling.* A state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.

(2) *Short term promotions.* An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(A) such promotions involve rates that will be in effect for no more than 90 days; and

(B) the incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscrimatory.

(c) *Branding.* Where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale.

(1) An incumbent LEC may impose such a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests.

(2) For purposes of this subpart, unbranding or rebranding shall mean that operator, call completion, or directory assistance services are offered in such a manner that an incumbent LEC's brand name or other identifying information is not identified to subscribers, or that such services are offered in such a manner that identifies to subscribers the requesting carrier's brand name or other identifying information.

§ 51.615 Withdrawal of services.

When an incumbent LEC makes a telecommunications service available only to a limited group of customers that have purchased such a service in the past, the incumbent LEC must also make such a service available at wholesale rates to requesting carriers to offer on a resale basis to the same limited group of customers that have purchased such a service in the past.

§ 51.617 Assessment of end user common line charge on resellers.

(a) Notwithstanding the provision in § 69.104(a) of this chapter that the end user common line charge be

assessed upon end users, an incumbent LEC shall assess this charge, and the charge for changing the designated primary interexchange carrier, upon requesting carriers that purchase telephone exchange service for resale. The specific end user common line charge to be assessed will depend upon the identity of the end user served by the requesting carrier.

(b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access charges provided in part 69, other than the end user common line charge, upon interexchange carriers that use the incumbent LEC's facilities to provide interstate or international telecommunications services to the interexchange carriers' subscribers.

Subpart H—Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) *Local telecommunications traffic.* For purposes of this subpart, local telecommunications traffic means:

(1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or

(2) telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport.* For purposes of this subpart, transport is the transmission of any necessary tandem switching of local telecommunications traffic subject to section 251 (b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office swich that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination.* For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunicâtions traffic that originates on the network facilities of the other carrier.

§ 51.703 Reciprocal compensation obligation to LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

§ 51.705 Incumbent LEC's rates for transport and termination.

(a) An incumbent LEC's rates for transport and termination of local telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(1) the forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511 of this part;

(2) default proxies, as provided, in § 51.707 of this part; or

(3) a bill-and-keep arrangement, as provided in § 51.713 of this part.

(b) In cases where both carriers in a reciprocal compensation arrangement are incumbent LECs, state commissions shall establish the rates of the smaller carrier on the basis of the larger carrier's forward-looking costs, pursuant to § 51.711 of this part.

§ 51.707 Default proxies for incumbent LEC's transport and termination rates.

(a) A state commission may determine that the cost information available to it with respect to transport and termination of local telecommunications traffic does not support the adoption of a rate or rates for an incumbent LEC that are consistent with the requirements of §§ 51.505 and 51.511 of this part. In that event, the state commission may establish rates for transport and termination of local telecommunications traffic, or for specific components included therein, that are consistent with the proxies specified in this section, provided that:

(1) any rate established through use of such proxies is superseded once that state commission establishes rates for transport and termination pursuant to §§ 51.705(a)(1) or 51.705(a)(3) of this part; and

(2) the state commission sets forth in writing a reasonable basis for its selection of a particular proxy for transport and termination of local telecommunications traffic, or for specific components included within transport and termination.

(b) If a state commission establishes rates for transport and termination of local telecommunications traffic

on the basis of default proxies, such rates must meet the following requirements:

(1) *Termination.* The incumbent LEC's rates for the termination of local telecommunications traffic shall be no greater than 0.4 cents ($0.004) per minute, and no less than 0.2 cents ($0.002) per minute, except that, if a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents ($0.005) per minute for such calls, that rate may be retained pending completion of a forward-loking economic cost study.

(2) *Transport.* The incumbent LEC's rates for the transport of local telecommunications traffic, under this section, shall comply with the proxies described in § 51.513(d)(3), (4), and (5) of this part that apply to the analogous unbundled network elements used in transporting a call to the end office that serves the called party.

§ 51.70 Rate structure for transport and termination.

(a) In state proceedings, a state commission shall establish rates for the transport and termination of local telecommunications traffic that are structured consistently with the manner that carriers incur those costs, and consistently with the principles in §§ 51.507 and 51.509 of this part.

(b) the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

§ 51.711 Symmetrical reciprocal compensation.

(a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c).

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

(2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.

(3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

(b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511 of this part, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that a higher rate is justified.

(c) Pending further proceedings before the Commission, a state commission shall establish the rates that licensees in the Paging and Radiotelephone Service (defined in part 22, subpart E of this chapter), Narrowband Personal Communications Services (defined in part 24, subpart D of this chapter), and Paging Operations in the Private Land Mobile Radio Services (defined in part 90,

subpart P of this chapter) may assess upon other carriers for the transport and termination of local telecommunications traffic based on the forward-looking costs that such licensees incur in providing such services, pursuant to §§ 51.505 and 51.511 of this part. Such licensees' rates shall not be set based on the default proxies described in § 51.707 of this part.

§ 51.713 Bill-and-keep arrangements for reciprocal compensation.

(a) For purposes of this subpart, bill-and-keep arrangements are those in which neither of the two interconnecting carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network.

(b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b) of this part.

(c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

§ 51.715 Interim transport and termination pricing.

(a) Upon request from a telecommunications carrier without an existing interconnection arrangement with an incumbent LEC, the incumbent LEC shall provide transport and termination of local telecommunications traffic immediately under an interim arrangement, pending resolution of negotiation or arbitration regarding transport

and termination rates and approval of such rates by a state commission under sections 251 and 252 of the Act.

(1) This requirement shall not apply when the requesting carrier has an existing interconnection arrangement that provides for the transport and termination of local telecommunications traffic by the incumbent LEC.

(2) A telecommunications carrier may take advantage of such an interim arrangement only after it has requested negotiation with the incumbent LEC pursuant to § 51.301 of this part.

(b) Upon receipt of a request as described in paragraph (a), an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of local telecommunications traffic at symmetrical rates.

(1) In a state in which the state commission has established transport and termination rates based on forward-looking economic cost studies, an incumbent LEC shall use these state-determined rates as interim transport and termination rates.

(2) In a state in which the state commission has established transport and termination rates consistent with the default price ranges and ceilings described in § 51.707 of this part, an incumbent LEC shall use these state-determined rates as interim rates.

(3) In a state in which the state commission has neither established transport and termination rates based on forward-looking economic cost studies nor established transport and termination rates consistent with the default price ranges described in § 51.707 of this part, an incumbent LEC shall set interim transport and termination rates at the default ceilings for end-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport (as described in § 51.707(b)(2) of this part).

(c) An interim arrangement shall cease to be in effect when one of the following occurs with respect to rates for transport and termination of local telecommunications traffic subject to the interim arrangement:

(1) a voluntary agreement has been negotiated and approved by a state commission;

(2) an agreement has been arbitrated and approved by a state commission; or

(3) the period for requesting arbitration has passed with no such request.

(d) If the rates for transport and termination of local telecommunications traffic in an interim arrangement differ from the rates established by a state commission pursuant to § 51.705 of this part, the state commission shall require carriers to make adjustments to past compensation. Such adjustments to past compensation shall allow each carrier to receive the level of compensation it would have received had the rates in the interim arrangement equalled the rates later established by the state commission pursuant to § 51.705 of this part.

§ 51.717 Renegotiation of existing non-reciprocal arrangements.

(a) Any CMRS provider that operates under an arrangement with an incumbent LEC that was established before August 8, 1996 and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.

(b) From the date that a CMRS provider makes a request under paragraph (a) until a new agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecom-

munications traffic that the incumbent LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement.

Subpart I—Procedures for Implementation of Section 252 of the Act.

§ 51.801 Commission action upon a state commission's failure to act to carry out its responsibility under section 252 of the Act.

(a) If a state commission fails to act to carry out its responsibility under section 252 of the Act in any proceeding or other matter under section 252 of the Act, the Commission shall issue an order preempting the state commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter and shall act for the state commission.

(b) For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.

(c) A state shall not be deemed to have failed to act for purposes of section 252(e)(5) of the Act if an agreement is deemed approved under section 252(e)(4) of the Act.

§ 51.803 Procedures for Commission notification of a state commission's failure to act.

(a) Any party seeking preemption of a state commission's jurisdiction, based on the state commission's failure to act, shall notify the Commission in accordance with following procedures:

(1) such party shall file with the Secretary of the Commission a petition, supported by an affidavit, that states with specificity the basis for the petition and any information that supports the claim that the state has failed to act, including, but not limited to, the applicable provisions of the Act and the factual circumstances supporting a finding that the state commission has failed to act;

(2) such party shall ensure that the state commission and the other parties to the proceeding or matter for which preemption is sought are served with the petition required in paragraph (a)(1) of this section on the same date that the petitioning party serves the petition on the Commission; and

(3) within fifteen days from the date of service of the petition required in paragraph (a)(1) of this section, the applicable state commission and parties to the proceeding may file with the Commission a response to the petition.

(b) The party seeking preemption must prove that the state has failed to act to carry out its responsibilities under section 252 of the Act.

(c) The Commission, pursuant to section 252(e)(5) of the Act, may take notice upon its own motion that a state commission has failed to act. In such a case, the Commission shall issue a public notice that the Commission has taken notice of a state commission's failure to act. The applicable state commission and the parties to a proceeding or matter in which the Commission has taken notice of the state commission's failure to act may file, within fifteen days of the issuance of the public notice, comments on whether the Commission is required to assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter.

(d) The Commission shall issue an order determining whether it is required to preempt the state commission's jurisdiction of a proceeding or matter within 90 days

after being notified under paragraph (a) of this section or taking notice under paragraph (c) of this section of a state commission's failure to carry out its responsibilities under section 252 of the Act.

§ 51.805 The Commission's authority over proceedings and matters.

(a) If the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, the Commission shall retain jurisdiction over such proceeding or matter. At a minimum, the Commission shall approve or reject any interconnection agreement adopted by negotiation, mediation or arbitration for which the Commission, pursuant to section 252(e)(5) of the Act, has assumed the state's commission's responsibilities.

(b) Agreements reached pursuant to mediation or arbitration by the Commission pursuant to section 252 (e)(5) of the Act are not required to be submitted to the state commission for approval or rejection.

§ 51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.

(a) The rules established in this section shall apply only to instances in which the Commission assumes jurisdiction under section 252(e)(5) of the Act.

(b) When the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, it shall not be bound by state laws and standards that would have applied to the state commission in such proceeding or matter.

(c) In resolving, by arbitration under section 252(b) of the Act, any open issues and in imposing conditions upon the parties to the agreement, the Commission shall:

(1) ensure that such resolution and conditions meet the requirements of section 251 of the Act, including the rules prescribed by the Commission pursuant to that section;

(2) establish any rates for interconnection, services, or network elements according to section 252(d) of the Act, including the rules prescribed by the Commission pursuant to that section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) An arbitrator, acting pursuant to the Commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(1) at the discretion of the arbitrator, final offer arbitration may take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration.

(2) negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit subsequent final offers following such negotiations.

(3) to provide an opportunity for final post-offer negotiations, the arbitrator will not issue a decision for at least fifteen days after submission to the arbitrator of the final offers by the parties.

(e) Final offers submitted by the parties to the arbitrator shall be consistent with section 251 of the Act, including the rules prescribed by the Commission pursuant to that section.

(f) Each final offer shall:

(1) meet the requirements of section 251, including the rules prescribed by the Commission pursuant to that section;

(2) establish rates for interconnection, services, or access to unbundled network elements according to section

252(d) of the Act, including the rules prescribed by the Commission pursuant to that section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. If a final offer submitted by one or more parties fails to comply with the requirements of this section, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission pursuant to that section.

(g) Participation in the arbitration proceeding will be limited to the requesting telecommunications carrier and the incumbent LEC, except that the Commission will consider requests by third parties to file written pleadings.

(h) Absent mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties.

§ 51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable relay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

(c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

14. Part 90 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

15. The authority citation for Part 90 is revised to read as follows:

AUTHORITY: Secs. 4, 251-2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303, 309 and 332, unless otherwise noted.

16. Section 90.5 is amended by adding paragraph (k) and renumbering the remaining paragraphs to read as follows:

* * * * *

(k) Part 51 contains rules relating to interconnection.

(l) * * *

(m) * * *

APPENDIX H

EXCERPTS

FROM *IN THE MATTER OF IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996*, SECOND REPORT AND ORDER, CC DOCKET NO. 96-98 (AUG. 8, 1996):

¶¶ 22-30 & Appendix B Rules 51.5, 51.205-.215

II. DIALING PARITY REQUIREMENTS

A. In General

22. With dialing parity a telephone customer can preselect any provider of telephone exchange service or telephone toll service without having to dial extra digits to route a call to that carrier's network. Until now, in most states, telephone customers wishing to have their intraLATA toll calls carried by a carier other than their current provider of telephone exchange service had to dial a five- or seven-digit prefix or access code before dialing the called party's telephone number.[29] Presubscription to a carrier other than a customer's telephone exchange service provider has not been an option for *interstate*, intraLATA toll calls or in most states for *intrastate*, intraLATA toll calls.[30] In states where intrastate, intraLATA toll dialing

[29] Sometimes referred to as "10XXX" or 101XXXX" dialing, callers may reach a long distance carrier in states where such dialing arrangements are authorized by dialing a five-digit carrier access code ("10XXX," with "XXX" representing a three-digit carrier identification code) or a seven digit carrier access code ("101XXXX," with "XXXX" representing a carrier identification code).

[30] An "interstate, intraLATA toll call" is a call that: (1) crosses a state boundary but does not cross a LATA boundary; and (2) is subject to a charge. A call from Philadelphia, Pennsylvania to Cherry Hill, New Jersey (currently handled by Bell Atlantic) is an example of such a call.

parity is available, a customer may presubscribe to a carrier other than his or her provider of telephone exchange service and have all of that customer's intrastate, intraLATA toll calls carried by that selected carrier simply by dialing "1" plus the area code and telephone number of the called party.[31] The section 251(b)(3) dialing parity obligation will foster vigorous local exchange and long distance competition by ensuring that each customer has the freedom and flexibility to chose among different carriers for different services without the burden of dialing access codes.

1. The Need for Minimum Nationwide Dialing Parity Standards

a. Background and Comments

23. Section 251(b)(3) imposes on all LECs the "duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service."[32] In the *NPRM*, we sought comment on whether the Commission should adopt nationwide dialing parity standards and, if so, what those standards should be.[33]

24. A majority of commenters urge the Commission to adopt uniform nationwide dialing parity guidelines, but commenters differ on how detailed such federal rules

[31] It is our understanding that some form of intraLATA toll dialing parity is available or has been ordered in Alaska, Arizona, Connecticut, Florida, Georgia, Illinois, Kentucky, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, West Virginia, Wisconsin and Wyoming. *See Ex parte* letter from Charles D. Cosson, USTA, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 96-98, July 10, 1996, at 2.

[32] 47 U.S.C. § 251(b)(3).

[33] *NPRM* at paras. 206, 207, 209-213, 218, 219.

should be. For example, the Telecommunications Resellers Association maintains that specific national standards are needed to ensure that competing providers are able to utilize common network designs in multiple markets and to prevent incumbent LECs from "gaming" or "manipulating the processes" of the states.[34] Ameritech urges the Commission to adopt "broad rules that afford sufficient flexibility to accommodate local conditions."[35] Other commenters, such as Bell Atlantic, opposing the adoption of federal dialing parity standards, assert that the proponents of such standards have failed to demonstrate how they or consumers have been harmed by "locally tailored implementation" of dialing parity in the intraLATA toll markets.[36] Without such a demonstration, argues Bell Atlantic, the Commission should not interfere with states' activities.[37] Cincinnati Bell Telephone Company (CBT) likewise opposes federal standards, maintaining that so long as a state regulatory commission adopts a toll dialing parity arrangement that "offers consumers a choice from at least two carriers, one of which is the local exchange carrier, the requirements of the 1996 Act have been met."[38]

b. Discussion

25. We conclude that the purpose of the statutory dialing parity requirements—to facilitate the introduction of competition in the local and toll markets—is best served by the adoption of broad guidelines and minimum federal standards that build upon the states' experiences. We conclude that such minimum nationwide standards will facilitate competition to the extent that new entrants

[34] Telecommunications Resellers Association reply at 8-9.

[35] Ameritech reply at i.

[36] Bell Atlantic reply at 2.

[37] *Id.*

[38] CBT comments at 5.

seeking to offer regional or national services will not be subjected to an array of differing state standards and timetables.[39] We note that our conclusion to adopt nationwide dialing parity standards is consistent with our conclusion in the *First Report and Order* that nationwide standards to implement other section 251 provisions are necessary to facilitate competition by serving as a backdrop against which interconnection negotiations and arbitration can occur.[40] We are persuaded that, contrary to the views of Bell Atlantic, the failure to adopt minimum federal standards would harm both new entrants and consumers by delaying the introduction of competition and imposing additional costs on competitors, including small entities, particularly when different network configurations are required in each market. We conclude that uniform standards—in some cases minimum, uniform standards—will speed competitive entry by more promptly opening the local and toll markets to competition.

2. Scope of the Dialing Parity Requirements

a. Background

26. Under section 251(b)(3) a LEC must provide dialing parity only to competing providers of telephone exchange service and telephone toll service.[41] The scope of the obligation to provide dialing parity, however, is not limited to a particular type of traffic or service. Section 251(b)(3) makes no distinction among international, interstate and intrastate traffic for purposes of the dialing

[39] We note that section 271(e)(2)(B) precludes most states from requiring a BOC to implement intraLATA toll dialing parity in a state before the BOC has received authority to provide in-region, interLATA services in such state or before three years after enactment of the 1996 Act, whichever is earlier. 47 U.S.C. § 271(e)(2)(B).

[40] See *First Report and Order* at section II.

[41] 47 U.S.C. § 251(b)(3).

parity provisions.[42] The statutory definition of "dialing parity" also contains no such distinctions and, instead, speaks generally in terms of the provision of "telecommunications services" by "a person that is not an affiliate of a local exchange carrier." [43] Based on the absence of any such distinctions in defining the scope of the dialing parity requirements, the *NPRM* tentatively concluded that section 251(b)(3) creates a duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with respect to all telecommunications services that require dialing to route a call, and encompasses international as well as interstate and intrastate, local and toll services.[44]

b. Comments

27. Numerous parties express support for the Commission's tentative conclusion.[45] Several parties qualify their support for this conclusion, however, by asserting that the duty to provide dialing parity to competing providers of telephone toll service applies to international calls only to the extent that it entitles a customer to route automatically, without the use of an access code, all of the customer's international calls to his or her presubscribed interLATA long distance carrier.[46] These parties maintain that section 251(b)(3) does not require LECs to provide customers a separate presubscription choice for international calling.[47]

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[42] *Id.*

[43] 47 U.S.C. § 153(15).

[44] *NPRM* at para. 206.

[45] *See, e.g.*, MFS comments at 2; California Commission comments at 3.

[46] *See, e.g.*, Sprint comments at 4-5; SBC comments at 5.

[47] *Id.*

28. A broad range of parties also support the tentative conclusion that section 251(b)(3) imposes a duty on the LEC to provide both local and toll dialing parity.[48] Two parties reject this tentative conclusion, arguing that the dialing parity requirements apply only to local calling and do not extend to toll services.[49] Specifically, Lincoln Telephone and the Pennsylvania Commission contend that Congress addressed toll dialing parity only in section 271(e)(2) of the 1996 Act as it relates to the conditions under which a BOC may enter the in-region, interLATA toll business and question the Commission's authority to implement toll dialing parity requirements.[50] U S WEST similarly argues that section 251(b)(3) imposes only a duty to provide local dialing parity and suggests that the only affirmative obligation to provide toll dialing parity is contained in the equal access provisions of section 251(g) of the 1996 Act, which, U S WEST states, applies only to the BOCs and GTE.[51] Lincoln Telephone makes the additional argument that competitive providers wishing to enter the intraLATA toll market should be required to "share responsibility for serving the entire LATA, rather than simply selecting the lowest cost customers from the most profitable exchanges without regard to that practice's effect on other customers." [52] The imposition of such a requirement, according to Lincoln Telephone, would "reflect a commitment to affordable universal service." [53]

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[48] *See, e.g.*, Excel comments at 6; MCI comments at 2; BellSouth comments at 9.

[49] Lincoln Telephone comments at 2-3; Pennsylvania Commission comments at 1-2.

[50] *Id.*

[51] U S WEST comments at 4-5.

[52] Lincoln Telephone comments at 5.

[53] *Id.* at 6.

c. Discussion

29. We adopt our tentative conclusion that section 251(b)(3) creates a duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with respect to all telecommunications services that require dialing to route a call, and encompasses international as well as interstate and intrastate, local and toll services.[54] We note that section 251(b)(3) does not limit the types of traffic or services for which dialing parity must be provided to competing providers of telephone exchange and telephone toll service. The reference to these types of providers clearly shows that dialing parity must be provided for exchange service and toll service. Nothing in the statutory language limits the scope of the dialing parity obligation to exchange and toll services or distinguishes among the various types of telecommunications services in imposing the dialing parity obligations. This conclusion is further supported by the statutory definition of dialing parity insofar as it refers to the provision of "telecommunications services" generally without distinction among various types of telecommunications services.[55] In addition, we are not persuaded that section 251(g) relieves certain LECs of the duty to provide toll dialing parity. That section contains no reference or cross reference to dialing parity or to section 251(b)(3). Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE, but does not exempt them or other LECs from the toll dialing parity requirements. Finally, we note that CMRS providers are not required to provide dialing parity or nondiscriminatory access under section 251(b)(3) because the Commission has not determined that CMRS providers are LECs and section 332(c) of the Communications Act

[54] *NPRM* at para. 206.

[55] The issue of whether a separate presubscription choice is required for international, interstate, and intrastate toll calls is discussed more fully in section II.B(2) *infra*.

of 1934 provides that a "person engaged in the provision of commercial mobile services . . . shall not be required to provide equal access to common carriers for the provision of toll services." [56]

30. Finally, concerning Lincoln Telephone's proposal to require competitive providers of intraLATA toll service to serve an entire LATA, rather than merely certain low cost customers within a LATA, we note that Lincoln Telephone, in essence, is asking us to condition a carrier's receipt of dialing parity upon that carrier's assuming the obligation of an "eligible" telecommunications carrier.[57] We find neither the language of section 251(b)(3) nor its legislative history supports the conclusion that Congress intended to condition a carrier's right to receive the benefits of dialing parity upon its assuming the obligations of an eligible telecommunications carrier. The issue of encouraging carriers to provide universal service throughout a service territory is beyond the scope of this proceeding.[58] Also, for the Commission to make LATA-wide or state-wide service a precondition of entry into that LATA or state would be to erect a major legal barrier to entry, particularly for smaller telecommunications services providers, that is contrary to the basic thrust of the 1996 Act.

[56] 47 U.S.C. § 332(c)(8).

[57] An eligible telecommunications carrier is a common carrier that offers all services that are supported by federal universal service support mechanisms under section 254(c) and that uses "media of general distribution" to advertise the availability of those services and its charges for them. 47 U.S.C. § 214(e)(1). The issue of which services should receive support from universal service support mechanisms is being addressed by the Commission and the Federal-State Joint Board on universal service, as required by new section 254 of the Communications Act, as amended by the 1996 Act. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93, (rel. Mar. 8, 1996) (*Universal Service NPRM*) (proposing rules to implement section 254 of the 1996 Act).

[58] *See Universal Service NPRM*.

APPENDIX B—FINAL RULES

Parts 51 and 52 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 51—INTERCONNECTION

1. The authority citation for Part 51 is:

AUTHORITY: Sections 1, 2, 4, 5, 48 Stat. 1066, as amended; 47 U.S.C. §§ 151, 152, 154, 155 unless otherwise noted. Interpret or apply secs. 3, 4, 201-05, 207-09, 218, 225-7, 251-2, 271 and 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. §§ 153, 154, 201-05, 207-09, 218, 225-7, 251-2, 271 and 332 unless otherwise noted.

2. Section 51.5 is amended by adding the following definitions in alphabetical order to read as follows:

§ 51.5 Terms and definitions.

* * * *

Dialing Parity. The term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically without the use of any access code, their telecommunications to the telecommunications service provider of the customer's designation from among 2 or more telecommunications service providers (including such local exchange carrier).

Information services. The term "information services" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Local Access and Transport Area (LATA). A "Local Access and Transport Area" is a contiguous geographic area—(A) established before February 8, 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a Bell operating company after February 8, 1996 and approved by the Commission.

Service provider. A "service provider" is a provider of telecommunications services or a provider of information services.

State. The term "state" includes the District of Columbia and the Territories and possessions.

Telecommunications service. The term "telecommunications service" refers to the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telephone exchange service. A "telephone exchange service" is: (1) a service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (2) a comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Telephone toll service. The term "telephone toll service" refers to telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

Unreasonable dialing delay. For the same type of calls, dialing delay is "unreasonable" when the dialing delay experienced by the customer of a competing provider is greater than that experienced by a customer of the LEC providing dialing parity, or nondiscriminatory access to operator services or directory assistance.

3. A new section 51.205 is added to read as follows:

§ 51.205 Dialing parity: general.

A local exchange carrier (LEC) shall provide local and toll dialing parity to competing providers of telephone exchange service or telephone toll service, with no unreasonable dialing delays. Dialing parity shall be provided for all originating telecommunications services that require dialing to route a call.

4. A new section 51.207 is added to read as follows:

§ 51.207 Local dialing parity.

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or, the called party's telecommunications service provider.

5. A new section 51.209 is added to read as follows:

§ 51.209 Toll dialing parity.

(a) A LEC shall implement throughout each state in which it offers telephone exchange service intraLATA and interLATA toll dialing parity based on LATA boundaries. When a single LATA covers more than one state, the LEC shall use the implementation procedures that each state has approved for the LEC within that state's borders.

(b) A LEC shall implement toll dialing parity through a presubscription process that permits a customer to select

a carrier to which all designated calls on a customer's line will be routed automatically. LECs shall allow a customer to presubscribe, at a minimum, to one telecommunications carrier for all interLATA toll calls and to presubscribe to the same or to another telecommunications carrier for all intraLATA toll calls.

(c) A LEC may not assign automatically a customer's intraLATA toll traffic to itself, to its subsidiaries or affiliates, to the customer's presubscribed interLATA or interstate toll carrier, or to any other carrier, except when, in a state that already has implemented intrastate, intraLATA toll dialing parity, the subscriber has selected the same presubscribed carrier for both intraLATA and interLATA toll calls.

(d) Notwithstanding the requirements of subsections (a) and (b), states may require that toll dialing parity be based on state boundaries if it deems that the provision of intrastate and interstate toll dialing parity is procompetitive and otherwise in the public interest.

6. A new section 51.211 is added to read as follows:

§ 51.211 Toll dialing parity implementation schedule.

(a) A LEC that does not begin providing in-region, interLATA or in-region, interstate toll services in a state before February 8, 1999, must implement intraLATA and interLATA toll dialing parity throughout that state on February 8, 1999 or an earlier date as the state may determine, consistent with section 271(e)(2)(b) of the Communications Act of 1934, as amended, to be in the public interest.

(b) A Bell Operating Company (BOC) that provides in-region, interLATA toll services in a state before February 8, 1999 shall provide intraLATA toll dialing parity throughout that state coincident with its provision of in-region, interLATA toll services.

(c) A LEC that is not a BOC that begins providing in-region, interLATA or in-region, interstate toll services in a state before August 8, 1997, shall implement intraLATA and interLATA toll dialing parity throughout that state by August 8, 1997. If the LEC is unable to comply with the August 8, 1997 implementation deadline, the LEC must notify the Commission's Common Carrier Bureau by May 8, 1997. In the notification, the LEC must state its justification for noncompliance and must set forth the date by which it proposes to implement intraLATA and interLATA toll dialing parity.

(d) A LEC that is not a BOC that begins providing in-region, interLATA or in-region, interstate toll services in a state on or after August 8, 1997, but before February 8, 1999 shall implement intraLATA and interLATA toll dialing parity throughout that state no later than the date on which it begins providing in-region, interLATA or in-region, interstate toll services.

(e) Notwithstanding the requirements of paragraphs (a)-(d) of this section, a LEC shall implement toll dialing parity under a state order as described below:

(i) If the state issued a dialing parity order by December 19, 1995 requiring a BOC to implement toll dialing parity in advance of the dates established by these rules, the BOC must implement toll dialing parity in accordance with the implementation dates established by the state order.

(ii) If the state issued a dialing parity order by August 8, 1996 requiring a LEC that is not a BOC to implement toll dialing parity in advance of the dates established by these rules, the LEC must implement toll dialing parity in accordance with the implementation dates established by the state order.

(f) For LECs that are not Bell Operating Companies, the term *in-region, interLATA toll service,* as used in

this section and § 51.213, includes the provision of toll services outside of the LEC's study area.

7. A new section 51.213 is added to read as follows:

§ 51.213 Toll dialing parity implementation plans.

(a) A LEC must file a plan for providing intraLATA toll dialing parity throughout each state in which it offers telephone exchange service. A LEC cannot offer intraLATA toll dialing parity within a state until the implementation plan has been approved by the appropriate state commission or the Commission.

(b) A LEC's implementation plan must include:

(1) a proposal that explains how the LEC will offer intraLATA toll dialing parity for each exchange that the LEC operates in the state, in accordance with the provisions of this section, and a proposed time schedule for implementation; and

(2) a proposal for timely notification of its subscribers and the methods it proposes to use to enable subscribers to affirmatively select an intraLATA toll service provider. A LEC that is not a BOC also shall identify the LATA with which it will associate for the purposes of providing intraLATA and interLATA toll dialing parity under this subpart.

(c) A LEC must file its implementation plan with the state commission for each state in which the LEC provides telephone exchange service, except that if a LEC determines that a state commission has elected not to review the plan or will not complete its review in sufficient time for the LEC to meet the toll dialing parity implementation deadlines in § 51.211, the LEC must file its plan with the Commission:

(1) no later than 180 days before the date on which the LEC will begin providing toll dialing parity in the state, or no later than 180 days before February 8, 1999, whichever occurs first; or

(2) for LECs that begin providing in-region, inter-LATA or in-region, interstate toll service (*see* § 51.211 (f)) before August 8, 1997, no later than 90 days after these rules are published in the Federal Register.

(d) The Commission will release a public notice of any LEC implementation plan that is filed with the Commission under paragraph (c) of this section.

(1) The LEC's plan will be deemed approved on the fifteenth day following release of the Commission's public notice unless, no later than the fourteenth day following the release of the Commission's public notice, either

(i) the Common Carrier Bureau notifies the LEC that its plan will not be deemed approved on the fifteenth day; or

(ii) an opposition to the plan is filed with the Commission and served on the LEC that filed the plan. Such an opposition must state specific reasons why the LEC's plan does not serve the public interest.

(2) If one or more oppositions are filed, the LEC that filed the plan will have seven additional days (*i.e.*, until no later than the twenty-first day following the release of the Commission's public notice) within which to file a reply to the opposition(s) and serve it on all parties that filed an opposition. The response shall:

(i) include information responsive to the allegations and concerns identified by the opposing party; and

(ii) identify possible revisions to the plan that will address the opposing party's concerns.

(3) If a LEC's plan is opposed under paragraph (d)(1)(ii) of this section, the Common Carrier Bureau will act on the plan within ninety days of the date on which the Commission released its public notice. In the event the Bureau fails to act within ninety days, the plan will not go into effect pending Bureau action. If the plan

is not opposed, but it did not go into effect on the fifteenth day following the release of the Commission's public notice (*see* paragraph (d)(c)(i) of this section), and the Common Carrier Bureau fails to act on the plan within ninety days of the date on which the Commission released its public notice, the plan will be deemed approved without further Commission action on the ninety-first day after the date on which the Commission released its public notice of the plan's filing.

8. A new section 51.215 is added to read as follows:

§ 51.215 Dialing parity: cost recovery.

(a) A LEC may recover the incremental costs necessary for the implementation of toll dialing parity. The LEC must recover such costs from all providers of telephone exchange service and telephone toll service in the area served by the LEC, including that LEC. The LEC shall use a cost recovery mechanism established by the state.

(b) Any cost recovery mechanism for the provision of toll dialing parity pursuant to this section that a state adopts must not:

(1) give one service provider an appreciable cost advantage over another service provider, when competing for a specific subscriber (*i.e.*, the recovery mechanism may not have a disparate effect on the incremental costs of competing service providers seeking to serve the same customer); or

(2) have a disparate effect on the ability of competing service providers to earn a normal return on their investment.